Supreme Court, U.S.
FILED

No. 09-09-35 JUL 07 2009

OFFICE OF THE CLERK
William K. Suter, Clerk

IN THE

Supreme Court of the United States

GENERAL MANUEL ANTONIO NORIEGA,

Petitioner,

v.

GEORGE PASTRANA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

FRANK. A. RUBINO
1001 Brickell Bay Drive
Suite 2206
Miami, FL 33131
(305) 858-5300

JON MAY
Counsel of Record
1001 Brickell Bay Drive
Suite 2206
Miami, FL 33131
(305) 373-3740

Counsel for Petitioner

223816

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

I. Whether the Eleventh Circuit Court of Appeals's interpretation of Section 5 of the Military Commissions Act of 2006 violates the Supremacy Clause of the Constitution of the United States.

II. Whether the Eleventh Circuit Court of Appeals's interpretation of the Geneva Convention to permit the extradition of prisoners of war conflicts with previous decisions of this Court on treaty interpretation and statutory construction.

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Contents	ii
Table of Appendices	iii
Table of Cited Authorities	iv
Opinions Below	1
Jurisdiction	1
Constitutional and Statutory Provisions Involved	1
Statement of the Case	2
Reasons for Granting the Petition	7
Conclusion	23

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The Eleventh Circuit Filed April 8, 2009 ..... 1a

Appendix B — Order Of The United States District Court For The Southern District Of Florida Denying Writs Of Habeas Corpus Dated September 7, 2007 ..... 19a

Appendix C — Order Dismissing Defendant's "Petition For Writ Of Habeas Corpus Pursuant To 28 U.S.C. § 2241" And Order Lifting Stay Of Extradition Of The United States District Court For The Southern District Of Florida Dated September 7, 2007 ..... 29a

Appendix D — Order Denying Defendant's Petition For Writs Of Habeas Corpus, Mandamus. And Prohibition Of The United States District Court For The Southern District Of Florida Entered August 24, 2007 ..... 36a

TABLE OF CITED AUTHORITIES

Page

Cases

Air France v. Saks,
470 U.S. 392 (1995) 15

Boumediene v. Bush,
__ U.S. __, 128 S.Ct. 2229 (2008) 9, 10

Hamdan v. Rumsfeld,
548 U.S 557, 126 S.Ct. 2749 (2006) ..... *passim*

Lindh v. Murphy,
521 U.S. 320 (1997) 18

Russello v. United States,
464 U.S. 16, 104 S.Ct. 296 (1983) 17, 23

Sanchez-Llamas v. Oregon,
548 U.S. 331, 126 S.Ct. 2669 (4th Cir. 2006) ... 10

Sosa v. Alvarez-Machain,
542 U.S. 692 (2004) 23

United States v. Noriega,
564 F.3d 1290 (2009) 1

United States v. Noriega,
746 F.Supp. 1506 (S.D.Fla. 1992) 3

Cited Authorities

Page

United States v. Noriega,
2007 WL 2947572 (S.D. Fla. Aug. 24, 2007)
(Noriega I) 4

United States v. Noriega,
2007 WL 2947981 (S.D. Fla. Sept. 7, 2007)
(Noriega II) 5

United States v. Santos,
__ U.S. __,128 S.Ct 2020 (2008) 12, 19

Constitutional Provisions

Supremacy Clause, Art. VI, Para. 2, U.S. Const.
..... 1

Statutes

Military Commissions Act of 2006 ("MCA"), Pub.
L. No. 109-366, § 5(a), 120 Stat. 2600, 2631
(2006)

Section 5 ..... 2, 6, 9, 12

Section 7 9

28 U.S.C. § 1254(1) 1

28 U.S.C. § 2241 ..... 4, 5, 6

28 U.S.C. § 2255 ..... 4, 5

Cited Authorities

Page

Uniform Code of Military Justice, 10 U.S.C. § 801 *et seq.*

Article 21 11

Treaties

Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S .T. 3316

Article 3 ..... 17, 19

Article 5 11

Article 12 ..... *passim*

Article 13 20

Article 14 20

Article 15 20

Article 16 20

Article 46 21

Article 47 ..... 21, 22

Article 48 21

Article 118 ..... 8, 13, 15

Article 119 21

Article 129 22

Cited Authorities

Page

Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 6 U.S.T. 3516

Article 45 ..... 15, 17, 18

Legislative Materials

Report of the Committee on Foreign Relations, Exec. Rept. No. 9, 84th Cong., 1st Sess, (1955) 7, 13

Treatises

Christiane Shields Delessert, Release and Repatriation of Prisoners of War and the End of Active Hostilities: A Study of Article 118, Paragraph 1, of the Third Geneva Convention Relative to the Treatment of Prisoners of War (1977) 8

3 Int'l Committee of Red Cross, Commentary, Geneva Conventions Relative to the Treatment of Prisoners of War (1960) 18

4 Int'l Committee of Red Cross, Commentary, Geneva Conventions Relative to the Protection of Civilians in Time of War (1960) 16

Petitioner General Manuel Antonio Noriega respectfully petitions for a writ of certiorari to review the decision of the Eleventh Circuit Court of Appeals affirming the decision of the District Court for the Southern District of Florida denying General Noriega's petition for writ of habeas corpus seeking an order to compel the United States to immediately repatriate General Noriega to Panama pursuant to the Geneva Convention Relative to the Treatment of Prisoners of War.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Eleventh Circuit (Pet. App. 1a-18a) is reported at 564 F.3d 1290.

JURISDICTION

This Eleventh Circuit affirmed the order of the District Court denying the petition for writ of habeas corpus on April 8, 2009. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Art. VI, Para. 2, U.S. Const.

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law

> of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding.

Sec. 5, Military Commissions Act (2006)

> (a) IN GENERAL.—No person may invoke the Geneva Conventions or any protocols thereto in any habeas corpus petition or other civil action or proceeding to which the United States, or a current or former officer, employee, member of the Armed Forces, or other agent of the United States is a party as a source of rights in any court of the United States or its States or territories.

STATEMENT OF THE CASE

In 1989 General Manuel Antonio Noriega nullified the presidential elections in Panama when the candidate he supported lost the popular vote. General Noriega was subsequently made the maximum leader of Panama and on December 15, 1989, General Noriega declared that a "state of war" existed between Panama and the United States. Four days later, December 20, 1989, President George Bush ordered U.S. troops into combat in Panama on a mission whose stated goals were to "safeguard American lives, restore democracy, preserve the Panama Canal treaties, and seize General Noriega to face federal drug charges." Approximately eleven days later General Noriega surrendered to American forces. On the flight to Florida, General Noriega was formally arrested by

agents of the Drug Enforcement Administration. *United States v. Noriega*, 746 F.Supp. 1506, 1511 (S.D.Fla. 1992).

General Noriega was subsequently tried on an indictment charging him with: RICO and RICO conspiracy (18 U.S.C. § 1962(c) and (d)) (Counts 1 & 2); conspiracy to import and distribute cocaine (21 U.S.C. § 963) (Counts 3 & 9); distribution of cocaine (21 U.S.C. § 959) (Counts 4, 5, & 10); manufacture of cocaine (21 U.S.C. § 959) (Count 6); conspiracy to manufacture, distribute and import cocaine (21 U.S.C. § 963) (Count 7); and unlawful travel to promote a business enterprise involving cocaine (18 U.S.C. § 1952(a)(3)) (Counts 11 & 12 — Count 12 was dismissed prior to trial).

In April 1992, General Noriega was convicted on Counts 1-7 and 11 and found not guilty on Counts 9 and 10. General Noriega was sentenced to concurrent terms of 20 years imprisonment on Counts 1 and 2, to be followed by concurrent terms of 15 years' imprisonment on Counts 3-7 and a consecutive term of 5 years' imprisonment on Count 11. General Noriega was ordered to serve concurrent terms of 3 years' special parole as to Counts 3-7. On March 4, 1999, Judge William Hoeveler reduced General Noriega's sentence to 30 years imprisonment making him eligible for mandatory release from prison after completion of two-thirds of his sentence. General Noriega was scheduled to be released on parole on September 9, 2007.

On July 17, 2007, the United States filed an initial complaint for the extradition of General Noriega to the Republic of France to stand trial on charges of engaging in financial transactions with the proceeds of illegal drug

trafficking. Thereafter, on July 23, 2007, General Noriega filed a Petition for Writs of Habeas Corpus, Mandamus, and Prohibition seeking an order that the Magistrate Judge immediately cease any proceedings on the extradition complaint based on General Noriega's argument that under the Third Geneva Convention the United States was required to repatriate him to Panama. Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316 (hereinafter "GC III"). That petition for writ of habeas corpus was brought under Title 28, United States Code, Section 2255, and was filed as part of General Noriega's prior criminal case. After a hearing on August 13, 2007, Judge William Hoeveler denied the petition for lack of jurisdiction, holding that Section 2255 "'applies to challenges against the sentence imposed, and [General Noriega] has not cited any defect in this Court's sentence as to [him].'" *United States v. Noriega*, 2007 WL 2947572, *1 (S.D. Fla. Aug. 24, 2007)(Noriega I) (Pet. App. 39a). Despite holding that he was without jurisdiction to rule on General Noriega's claims, Judge Hoeveler issued a 12 page opinion in which he addressed in detail Petitioner's arguments. The Court did so in contemplation that counsel would immediately file a Section 2241 petition with the Court. *Id.*

On August 28, 2007, Magistrate Judge William Turnoff conducted an extradition hearing. At that hearing General Noriega reiterated his position that pursuant to the Geneva Convention the United States was required to immediately repatriate him to Panama. The next day, Magistrate Judge Turnoff issued a Certificate of Extraditability.

On September 5, 2007, General Noriega filed an Emergency Motion for Stay of Extradition and a Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2241. In this petition General Noriega re-asserted the arguments that he had previously advanced in his Section 2255 petition. He further argued that the United States had failed to comply with the requirement of Article 12 of Geneva III that the detaining Power satisfy itself of the willingness and ability of France to apply the Convention prior to the extradition. These pleadings were filed as part of General Noriega's prior criminal case without objection by the government. *United States v. Noriega*, 2007 WL 2947981, *1 (S.D. Fla. Sept. 7, 2007)(Noriega II)(Pet. App. 30).

On September 7, 2007, Judge Hoeveler issued an order dismissing the Petition for Writ of Habeas Corpus. Judge Hoeveler held that he did not have jurisdiction to rule on the habeas petition since it was filed in the criminal case. Judge Hoeveler held that the proper mechanism for challenging a certificate of extraditability is to file a petition for writ of habeas corpus as a new civil action, not to file such a petition as part of a pre existing criminal case. Judge Hoeveler went on to note that, if he had jurisdiction over the petition, he would have denied it on the merits because "the United States 'has satisfied itself . . . [that Defendant] will be afforded the same benefits that he has enjoyed for the past fifteen years in accordance with this Court's 1992 order declaring him a prisoner of war.'" *United States v. Noriega*, 2007 WL 2947981, *1 (S.D. Fla. Sept. 7, 2007)(Noriega II)(Pet. App. 31a).

On October 26, 2007 General Noriega blind filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2241. This petition was assigned to the Honorable Paul C. Huck. Judge Huck suggested that he was disposed to adopt the previous advisory opinions issued by Judge Hoeveler subject to any additional claims that were raised in the petition before him that had not been resolved by Judge Hoeveler. Supplemental briefing was filed, a hearing was held, and Judge Huck issued an order denying General Noriega's motion (Pet. App. 19a – 28a).

On April 8, 2009, the Eleventh Circuit affirmed and held that § 5 of the Military Commissions Act of 2006 ("MCA"), Pub. L. No. 109-366, § 5(a), 120 Stat. 2600, 2631, note following 28 U.S.C. § 2241 (2006), precluded General Noriega from invoking the Geneva Convention as a source of rights in a habeas corpus proceeding. (Pet. App. 12a – 14a). The Eleventh Circuit also concluded that extradition would not violate the Geneva Convention. (Pet. App. 14a – 17a).

REASONS FOR GRANTING THE PETITION

I. THE ELEVENTH CIRCUIT COURT OF APPEALS'S INTERPRETATION OF SECTION 5 OF THE MILITARY COMMISSIONS ACT OF 2006 VIOLATES THE SUPREMACY CLAUSE OF THE CONSTITUTION OF THE UNITED STATES

Following the conclusion of the Korean War, the United States ratified the four Geneva Conventions of 1949. As the Report of the Senate Committee on Foreign Relations observed when it submitted the Conventions for Senate approval:

> [T]hese four conventions may rightly be regarded as a landmark in the struggle to obtain for military and civilian victims of war, a humane treatment in accordance with the most approved international usage. The United States has a proud tradition of support for individual rights, human freedom, and the welfare and dignity of man. Approval of these conventions by the Senate would be fully in conformity with this great tradition.

Report of the Committee on Foreign Relations, Exec. Rept. No.9, 84th Cong., 1st Sess, (1955).

Over the past 144 years, the Geneva conventions have evolved from a single document concerned solely with the care of wounded and sick soldiers, to a comprehensive body of law addressing a host of issues related to the treatment of both prisoners of war and

civilians. As the nature of warfare changed, from battles between armies in the field and navies at sea, to total war directed against civilian populations and economic infrastructure, the conventions changed as well, addressing new problems arising from the latest conflicts. At the conclusion of the Second World War, one of the most dramatic and difficult challenges facing the international community was the repatriation of civilians and prisoners of war who remained under the control of the various victorious powers. At the time that the new conventions were proposed, "Thousands [of prisoners of war] were still in French, British and Soviet hands and several hundreds were not accounted for." Christiane Shields Delessert, Release and Repatriation of Prisoners of War and the End of Active Hostilities: A Study of Article 118, Paragraph 1, of the Third Geneva Convention Relative to the Treatment of Prisoners of War (1977), p. 62 (hereinafter "Delessert."). Many of these soldiers lost their status as prisoners of war. Nearly 100,000 Germans in France were pressed into working on civilian reconstruction projects, essentially as slave labor. Delessert at 62, n.75. These soldiers were uppermost in the minds of the delegates who assembled in Geneva in 1948 to revise the convention. Their plight led to the promulgation of Article 118 which commands:

> *Prisoners of war shall be released and repatriated without delay after the cessation of hostilities.*

Geneva Convention Relative to the Treatment of Prisoners of War ("Geneva III"), August 12, 1949, 6 U.S.T. 3316. Delessert at 70.

Just prior to the completion of his criminal sentence, the United States sought General Noriega's extradition to France. General Noriega filed a petition for writ of habeas corpus objecting to his extradition to France arguing that under the Geneva Convention, the United States was required to immediately repatriate him to Panama.

In *Hamdan v. Rumsfeld*, 548 U.S 557, 126 S.Ct. 2749 (2006), this Court held that military commissions were not expressly authorized by Congress and that the procedures promulgated pursuant to executive order violated the Uniform Code of Military Justice. This Court also held that the procedures adopted failed to satisfy the Geneva Convention. Congress responded to *Hamdan* by enacting the Military Commissions Act of 2006 which explicitly stripped the courts of authority to consider challenges to detention brought by persons designated as enemy combatants. This provision, contained in Section 7 of the Act, was struck down by this Court in *Boumediene v. Bush*, __U.S. __, 128 S.Ct. 2229 (2008).

In Section 5 of this Act, Congress also sought to restrict the kinds of rights which could be invoked before the courts. Unlike Section 7, which applied solely to persons designated enemy combatants, Section 5 applied to any person, including United States Citizens. Section 5 of the MCA states:

> (a) IN GENERAL.—No person may invoke the Geneva Conventions or any protocols thereto in any habeas corpus petition or other civil action or proceeding to

> which the United States, or a current or former officer, employee, member of the Armed Forces, or other agent of the United States is a party *as a source of rights in any court* of the United States or its States or territories. (Emphasis added)

The Eleventh Circuit held that this provision absolutely and unambiguously prohibits persons from raising any claim based upon the four Geneva Conventions of 1949.

This interpretation by the Eleventh Circuit of the word "rights" assumes a definition of the word that is nowhere found in the statute. It is just as reasonable to conclude that "rights in court" means such privilege's as the right to counsel, the right to confront ones accusers, the right to know the charges against one, as it does claims derived from the protections afforded prisoners of war under the Geneva Convention.

For instance, a legal action seeking an order directing authorities to cease the torture of a prisoner may cite to provisions of the Geneva Convention, but that is not the same thing as a right being exercised in court; rather it is a remedy being sought from a court. The question before this Court now is one that was left open in *Boumediene*, wherein the Court stated that its opinion "does not address the content of the law that governs petitioners' detention," leaving that question for another day. 128 S.Ct. at 2277. This is an important constitutional question since an interpretation of law that results in the repeal of a treaty violates the Supremacy Clause of the Constitution of the United States. *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 126 S.Ct. 2669, 1271 (4th Cir. 2006).

The ultimate effect of the Eleventh Circuit's interpretation of Article 5 (GC III) is the complete repudiation of the Geneva Convention. The Convention depends upon the authority of competent tribunals to decide whether a particular individual is a prisoner of war and thus entitled to the full panoply of protections guaranteed by the Convention.

> *Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.*

Article 5, GC III. Pursuant to Eleventh Circuit's interpretation of Section 5 (MCA), no tribunal would have the authority to grant any such status.

While Congress may well have wanted to limit the ability of prisoners of war to challenge proceedings before Military Commissions, the Eleventh Circuit's interpretation of Section 5 leads to a wholesale repudiation of the Geneva Convention itself. Moreover, it will result in confusion over the interpretation of Article 21 of the Uniform Code of Military Justice, 10 U.S.C. § 801 et. seq. which this Court observed incorporated by reference the common law of war including the four Geneva Conventions. *Hamdan*, 126 S.Ct. at 2780. Indeed, it could be said that the Geneva Conventions are so woven into the fabric of the law of war, that to cast them out would be to return the law to

where it stood when Sherman marched on Atlanta. There is no evidence that Congress intended that.[1] At best, the statutory scheme is ambiguous, and under the doctrine of lenity, such ambiguity must be construed in favor of General Noriega. *United States v. Santos*, __ U.S. __,128 S.Ct 2020 (2008).

Ultimately, the Eleventh Circuit's decision herein encroaches upon the powers of the Executive and Legislative branches. Its interpretation of Section 5 (MCA) threatens our Nation's commitment to international humanitarian law. Its interpretation of Section 5 undermines protections that apply not only to prisoners of war of the United States but to our own men and woman who find themselves prisoners of war of other nations. As the Committee on Foreign Relations observed in 1955:

> We should not be dissuaded by the possibility that at some later date a contracting party may invoke specious reason to evade compliance with the obligations of decent treatment which it has freely assumed in these instruments. Its conduct can now be

---

1. Although the Court relied upon legislative history to support its interpretation of Section 5 (MCA)(Pet. App. 13a – 14a) that history does not contain a definition the word "rights." The closest it comes to supporting the Eleventh Circuit's interpretation is Senator McCain's statement that this provision would bar a private right of action against U.S. personnel. But nothing in any of the Geneva Conventions purports to create any such remedies to begin with. Thus Senator McCain's observations can not bear the weight of the Eleventh Circuit's reliance upon them.

> measured against their approved standards, and the weight of world opinion cannot but exercise a salutary restraint on otherwise unbridled actions. If the end result is only to obtain for Americans caught in the maelstrom of war a treatment which is 10 percent less vicious than what they would receive without these conventions, if only a few score of lives are preserved because of the efforts at Geneva, then the patience and laborious work of all who contributed to that goal will not have been in vain.

Report of the Committee on Foreign Relations, Exec. Rept. No.9, 84th Cong., 1st Sess, (1955).

II. THE ELEVENTH CIRCUIT COURT OF APPEALS'S INTERPRETATION OF THE GENEVA CONVENTION TO PERMIT THE EXTRADITION OF PRISONERS OF WAR CONFLICTS WITH PREVIOUS DECISIONS OF THIS COURT ON TREATY INTERPRETATION AND STATUTORY CONSTRUCTION

Article 118 of the Geneva Convention Relative to the Treatment of Prisoners of War, (GC III) commands:

> *Prisoners of war shall be released and repatriated without delay after the cessation of hostilities.*

Only in the case of war criminals is a Power permitted to extradite a prisoner of war to another country. Only where a prisoner of war is still serving a sentence for

the commission of a crime, is any delay of repatriation permitted. Because there is no specific authority permitting extradition of prisoners of war, the courts below relied upon Article 12 of the Convention which addresses transfers of prisoners between allies during a time of conflict. This interpretation is contrary to the intent of this provision as demonstrated by a plain reading of its text. The full article states:

> *Prisoners of war are in the hands of the enemy Power, but not of the individuals or military units who have captured them. Irrespective of the individual responsibilities that may exist, the Detaining Power is responsible for the treatment given them.*
>
> *Prisoners of war may only be transferred by the Detaining Power to a Power which is a party to the Convention and after the Detaining Power has satisfied itself of the willingness and ability of such transferee Power to apply the Convention. When prisoners of war are transferred under such circumstances, responsibility for the application of the Convention rests on the Power accepting them while they are in its custody.*
>
> *Nevertheless if that Power fails to carry out the provisions of the Convention in any important respect, the Power by whom the prisoners of war were transferred shall, upon being notified by the Protecting Power, take effective measures to correct the situation or shall request the return of the prisoners of war. Such requests must be complied with.*

Nothing in Article 12 grants any nation the right to disregard the mandate of Article 118. The first paragraph places ultimate responsibility for the well-being of prisoners of war with the Power, ie nation, that detains them. Responsibility for any harm that befalls the prisoner cannot be avoided by blaming it on the unauthorized actions of individuals or military units. The second paragraph is not a grant of authority. It places restrictions on the practice of transferring prisoners from one Power to another. Transfer is prohibited unless the Detaining Power is satisfied that the Receiving Power is both willing and able to apply the Convention. The third paragraph places upon the Detaining Power the ongoing duty to insure that the prisoner is afforded the protections of the Geneva Convention while in the custody of the Receiving Power.

As in statutory construction, the text of the treaty is central to its interpretation. *Air France v. Saks*, 470 U.S. 392, 397-98 (1995), ("[t]he analysis must begin, however, with the text of the treaty and the context in which the written words are used."). An analysis of the words used in Article 12 demonstrates that it does not constitute a grant of any authority authorizing a Detaining Power to extradite a prisoner of war to another nation. Rather it is a limitation upon whatever other authority exists within the Convention.

Because the Geneva Convention mandates repatriation and does not provide for extradition, the Courts below looked to Article 45 of the Civilian Convention which specifically states that the provisions of this article "'do not constitute an obstacle to the extradition, in pursuance of extradition treaties

concluded before the outbreak of hostilities of protected persons accused of offenses against ordinary criminal law.' Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War, art. 45, 12 August 1949, 6 U.S.T. 3516." (Pet. App. 17a). The Court also relied upon the Commentary to Article 45 which states that the term "transfer" may mean "internment in the territory of another Power, repatriation, the returning of protected persons to their country of residence or their extradition." 4 Int'l Committee of Red Cross, Commentary, Geneva Conventions Relative to the Protection of Civilians in Time of War (1960) 266 (hereinafter GCIV Commentary). *Id.*

While the Court below recognized that the purpose of the Fourth Convention is different from the Third, nevertheless it found compelling the fact "that the convening parties expressed an understanding of the term 'transfer' which included extradition." (Pet. App. 17a).

The Court's analysis runs afoul of basic rules of statutory construction. As this Court has explained:

> A familiar principle of statutory construction, relevant both in *Lindh* and here, is that a negative inference may be drawn from the exclusion of language from one statutory provision that is included in other provisions of the same statute. See *id.*, at 330, 117 S.Ct. 2059; see also, *e.g.*, Russello v. United States, 464 U.S. 16, 23, 104 S.Ct. 296, 78 L.Ed.2d 17 (1983) (" '[W]here Congress includes particular language in one section of a statute but omits it

> in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion' ")

Hamdan, 548 U.S at 578, 126 S.Ct. at 2765-66.

Nowhere in the text of Article 12 (GCIII) or in its Commentary is the word "extradition" ever used. By contrast, the term "extradition" is explicitly used in both the text and the Commentary to Article 45 (GCIV). This clearly demonstrates that had the drafters intended to sanction extradition proceedings in the Prisoner of War Convention, they knew how to do so. *See, e.g., Russello v. United States*, 464 U.S. 16, 23, 104 S.Ct. 296 (1983)("'[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'"). The fact that the two Conventions were drafted in tandem strengthens this presumption. *Hamdan*, 548 U.S. at 579, 126 S.Ct. at 2766.

Moreover, where the drafters of the four conventions sought to adopt the same principles, they did so by including articles that were common to each convention and were written in nearly identical language. Thus Article 3 of the Prisoner of War Convention, pertaining to CONFLICTS NOT OF AN INTERNATIONAL CHARACTER, is identical to Article 3 of the Civilian Convention (and to the other two Conventions as well). They are known as "Common Articles."

It is significant to note that all four of the Geneva Conventions of 1949 were drafted during the same four month period of time, culminating in the simultaneous signature by seventeen of the delegations to all four conventions on August 12, 1949. 3 Int'l Committee of Red Cross, Commentary, Geneva Conventions Relative to the Treatment of Prisoners of War 9 (1960) (herein after GCIII Commentary). As the Commentary explained:

> The Conference set up four main Committees, which sat simultaneously and considered (a) the revision of the First Geneva Convention and the Hague Agreement of 1899 which adapts that Convention to maritime warfare, (b) the revision of the Prisoner of War Convention, (c) the preparation of a Convention for the protection of civilians in time of war, and (d) provisions common to all four Conventions. Numerous working parties were formed, and there were also a Co-ordination Committee and a Drafting Committee, which met towards the end of the Conference and endeavored to achieve a uniform presentation of the texts.

Id. p. 7. Thus the circumstances involving the drafting and signing of the Convention is further proof that the drafters did not intend for the word transfer as used in Article 12 of the Prisoner of War Convention to include the definition of that term from Article 45 of the Civilian Convention. *Lindh v. Murphy*, 521 U.S. 320, 330 (1997)(holding that certain limitations on the availability of habeas relief imposed by AEDPA applied only to cases

filed after that statute's effective date where Congress' failure to identify the temporal reach of those limitations, which governed noncapital cases, stood in contrast to its express command in the same legislation that new rules governing habeas petitions in capital cases "apply to cases pending on or after the date of enactment.").[2]

In *Hamdan* , this Court relied heavily on the Commentaries to the Geneva Convention in interpreting the scope of Common Article 3. 548 U.S at 631, 126 S.Ct.

---

2. The Eleventh Circuit was concerned that Petitioner's interpretation of the Geneva Convention would lead to the anomalous result of civilians being subject to extradition but not prisoners of war. (Pet. App. 17a). But as this Court pointed out in *Santos*:

> When interpreting a criminal statute, we do not play the part of a mind reader. In our seminal rule-of-lenity decision, Chief Justice Marshall rejected the impulse to speculate regarding a dubious congressional intent. "[P]robability is not a guide which a court, in construing a penal statute, can safely take." *United States v. Wiltberger, 5 Wheat. 76, 105, 5 L.Ed. 37 (1820).*

128 S.Ct. 2026. It is not so anomalous a result given the significant differences in treatment afforded prisoners of war and civilians. A prisoner of war may be held for many years in confinement and in conditions significantly different from civilians. The drafters may well have decided it more important to insure that prisoners be returned home without delay believing that in most instances the question of extradition could be addressed between the requesting state and the prisoner's home nation. Finally, the Geneva Convention should not be a shield used by a civilian who is on the run from the Requesting Power. That will not be the case of a prisoner of war who is in the custody of the Detaining Power involuntarily.

at 2796. The Commentary to Article 12 (GC III) explains that this Article addresses the "special case" of prisoners of war transferred from one belligerent Power to another during time of war. GC III Commentary at 128. "This practice, which became increasingly common during the Second World War, raises a problem quite distinct from the question of the accommodation and hospitalization of prisoners of war in a neutral country." *Id.* at 131. The Commentary reported that, "the significance of this question has deepened with the establishment of military organizations for collective defense such as the North Atlantic Treaty Organization and the Warsaw Pact, which place the armed forces of several Powers under a unified command in case of conflict." *Id.* at. 132.

That this Article was designed solely to address the responsibility of nations during the course of an ongoing war is made crystal clear by the statement that "There must be no possibility for a group of States which are fighting together to agree to hand over to one of their members not a party to the Convention all or some of the prisoners whom they have captured jointly, thus evading the application of the Convention." *Id.* at 136.

Moreover, Article 12 is found in Part II of the Convention. Part II is entitled GENERAL PROTECTION OF PRISONERS OF WAR. Other Articles within this part include: *Humane treatment of prisoners* (Article 13); *Respect for the person of prisoners* (Article 14); *Maintenance of prisoners* (Article 15); and *Equality of treatment* (Article 16). By contrast Article 119, para. 5, which permitted the United States to detain General Noriega in the United States

pending completion of his punishment is found in Part IV, TERMINATION OF CAPTIVITY. Paragraph 5 of Article 119 of Geneva III, states:

> *Prisoners of war against whom criminal proceedings for an indictable offense are pending may be detained until the end of such proceedings, and, if necessary until the completion of the punishment. The same shall apply to prisoners of war already convicted of an indictable offense.*

This was the authority that permitted the United States to delay General Noriega's repatriation pending his parole on the criminal conviction. But it provides no authority for any other nation to delay a prisoner's repatriation and it was clearly meant to apply only to prisoners in the custody of a nation due to his or her capture during time of war. This is clear from the first paragraph of Article 119, which states:

> *Repatriation shall be effected in conditions similar to those laid down in Articles 46 to 48 inclusive of the present Convention for the transfer of prisoners of war, having regard to the provisions of Article 118 and to those of the following paragraphs.*

Articles 46 through 48 are found in Part III, entitled CAPITIVITY, Chapter VIII, *Transfer of prisoners of war after their arrival in camp.* Article 46 addresses *Conditions*, Article 47 addresses *Circumstances precluding transfer*, and Article 48 *Procedure for transfer*. The Commentary to each of these Articles

demonstrates that in each instance, the Convention intended to clarify the protections guaranteed to prisoners during time of war. *See, e.g.*, GC III Commentary p. 254, "During the Second Word War, many prisoners-of-war convoys, particularly those transferred by sea, were attacked and heavy losses were caused. The International Committee of the Red Cross therefore appealed to the Detaining Powers to resort to conveyances of prisoners of war by sea only for imperative reasons;" Finally Paragraph 2 of Article 47 states, "*If the combat zone draws closer to a camp, the prisoner of war in said camp shall not be transferred unless the transfer can be carried out in adequate conditions of safety. . . .*"

Plainly, the Prisoner of War Convention requires the immediate return home of prisoners of war at the end of hostilities subject to completion of any sentence imposed for crimes prosecuted by the Detaining Power. Only in the case of war criminals is any exception permitted.

The drafters of the Prisoner of War Convention contemplated one narrow circumstance where it would be necessary for one Power to turn over a prisoner of war to another Power to the Convention—that involving war criminals. Article 129 states in relevant part:

> *Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may*

> *also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case.*

Grave breaches are, of course, war crimes. What this Article demonstrates is that had the drafters' of the Geneva Convention wanted to permit transfers from one Power to another for purposes of prosecution for ordinary offenses, they knew how to do so. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 711 n. 9 (2004). *Hamdan, supra, Russello supra.*

CONCLUSION

The petition for certiorari should be granted and General Noriega should be returned to Panama.

Respectfully submitted,

FRANK. A. RUBINO
1001 Brickell Bay Drive
Suite 2206
Miami, FL 33131
(305) 858-5300

JON MAY
Counsel of Record
1001 Brickell Bay Drive
Suite 2206
Miami, FL 33131
(305) 373-3740

Counsel for Petitioner

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED APRIL 8, 2009

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 08-11021

D.C. Docket No. 07-22816-CV-PCH

GENERAL MANUEL ANTONIO NORIEGA,

Petitioner-Appellant,

versus

GEORGE PASTRANA, Warden, FCI Miami,
HILLARY CLINTON, Secretary of State,
United States Department of State,

Respondents-Appellees.

Appeal from the United States District Court
for the Southern District of Florida

(April 8, 2009)

Before DUBINA and CARNES, Circuit Judges, and RESTANI,* Judge.

---

* Honorable Jane A. Restani, Chief Judge of the United States Court of International Trade, sitting by designation.

Appendix A

RESTANI, Chief Judge:

Appellant General Manuel Antonio Noriega appeals the decision of the United States District Court for the Southern District of Florida denying his petition for writ of habeas corpus. The district court determined that the Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 ("Third Geneva Convention" or "Convention"), does not foreclose the extradition of prisoners of war and that the United States had sufficiently complied with its obligations under the Convention. We affirm and hold that § 5 of the Military Commissions Act of 2006 ("MCA"), Pub.L. No. 109-366, § 5(a), 120 Stat. 2600, 2631, note following 28 U.S.C. § 2241 (2006), precludes Noriega from invoking the Geneva Convention as a source of rights in a habeas proceeding and therefore deny Noriega's habeas petition. We also conclude that extradition would not violate the Convention.

BACKGROUND

In February 1988, a federal grand jury in the Southern District of Florida indicted Noriega on drug-related conspiracy charges. In April 1992, Noriega was convicted for RICO and RICO conspiracy (18 U.S.C. § 1962(c) and (d)), conspiracy to import and distribute cocaine (21 U.S.C. § 963), distribution of cocaine (21 U.S.C. § 959), manufacture of cocaine (21 U.S.C. § 959), conspiracy to manufacture, distribute, and import cocaine (21 U.S.C. § 963), and unlawful travel to promote

a business enterprise involving cocaine (18 U.S.C. § 1952(a)(3)). Noriega was sentenced to concurrent terms of twenty years' imprisonment, followed by concurrent terms of fifteen years' imprisonment, a consecutive term of five years' imprisonment, and concurrent terms of three years' special parole. Noriega was designated a prisoner of war and accorded the benefits conferred on prisoners of war by the Third Geneva Convention.[1] The district court reduced Noriega's sentence to thirty years' imprisonment on March 4, 1999, and Noriega was scheduled to be released on parole on September 9, 2007.

At the request of the French government, the United States filed a complaint on July 17, 2007, for the extradition of Noriega, pursuant to an extradition treaty with France.[2] On July 23, 2007, Noriega filed a petition

---

1. The district court determined that Noriega was a prisoner of war under the Third Geneva Convention in response to Noriega's concerns about the type of care he would receive while in custody. *United States v. Noriega*, 808 F.Supp. 791, 793-96 (S.D.Fla.1992) (Hoeveler, J.) ("*Noriega I*"). Specifically, the district court found that the hostilities in Panama constituted an "armed conflict" within the meaning of article 2, that Noriega was a member of the armed forces of a party to the conflict under article 4, and that the district court was a "competent tribunal" to determine his prisoner of war status under article 5 of the Third Geneva Convention. *Id.* This determination was not appealed.

2. Noriega was convicted *in absentia* in France of using the proceeds of illegal drug trafficking to engage in financial transactions. Noriega will have the opportunity to challenge this conviction and seek a new trial upon his surrender to France.

in the related criminal case for a writ of habeas corpus under 28 U.S.C. § 2255,[3] alleging that the extradition violated his rights under the Third Geneva Convention. The district court denied his petition on August 24, 2007, for lack of jurisdiction, finding that because Noriega was not challenging his sentence, § 2255 did not apply. *United States v. Noriega*, No. 88-0079-CR, 2007 WL 2947572, at *1 (S.D.Fla. Aug. 24, 2007) (Hoeveler, J.) ("*Noriega II*"). Nevertheless, because of the imminency of the extradition hearing, Noriega's planned release, and the expectation that Noriega would refile the petition correctly under 28 U.S.C. § 2241,[4] the district court reviewed the petition on the merits. *Id.* The district court reasoned that even if it had jurisdiction, it would still deny the petition because the United States had satisfied its international obligations under the Third Geneva Convention. *Id.* at *2-5. An extradition hearing was held on August 28, 2007, and a Certificate of Extraditability was issued on August 29, 2007.

On September 5, 2007, in the related criminal case, Noriega filed a petition for a writ of habeas corpus

---

3. A prisoner's "collateral attack[ ] on the validity of a federal sentence must be brought under § 2255," *Darby v. Hawk-Sawyer*, 405 F.3d 942, 944 (11th Cir.2005), by "mov[ing] the court which imposed the sentence to vacate, set aside or correct the sentence," 28 U.S.C. § 2255(a).

4. Under 28 U.S.C. § 2241, "[w]rits of habeas corpus may be granted" to a prisoner "in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241(a), (c)(3).

pursuant to 28 U.S.C. § 2241, alleging that the United States had not complied with article 12 of the Third Geneva Convention by satisfying itself of France's willingness and ability to consider Noriega a prisoner of war and apply the Convention. On September 7, 2007, the district court again dismissed the habeas petition for lack of jurisdiction, because Noriega had failed to file his petition in a new civil action. *United States v. Noriega*, No. 88-0079-CR, 2007 WL 2947981, at *1 (S.D.Fla. Sept. 7, 2007) (Hoeveler, J.) ("*Noriega III*"). The district court intimated that it still would have denied the petition on the merits, because the United States had demonstrated that upon extradition Noriega would be afforded the same benefits he enjoyed in the United States. *Id.*

Noriega filed the habeas petition that is before us on October 26, 2007. On January 14, 2008, the district court adopted the findings of fact, legal analysis, and conclusions of law set forth in the August 24, 2007, and September 7, 2007, orders and denied the petition. *Noriega v. United States*, No. 07-CV-22816-PCH, 2008 WL 331394, slip op. at 6-7 (S.D.Fla. Jan. 14, 2008) (Huck, J.) ("*Noriega IV*"). The district court concluded that the Third Geneva Convention did not bar Noriega's extradition to France. Noriega now appeals.[5]

---

5. On October 5, 2007, this Court dismissed for want of prosecution Noriega's appeal of the September 7, 2007 order denying his § 2241 habeas petition. On February 11, 2008, we granted Noriega's voluntary dismissal of his appeal of the August 24, 2007 order denying his § 2255 habeas petition.

Appendix A

JURISDICTION

Noriega is in federal custody and has sought habeas corpus relief under 28 U.S.C. § 2241 to challenge his extradition. We have jurisdiction under 28 U.S.C. §§ 1291 and 2253 to review a final order in a habeas proceeding and can therefore decide whether any law prevents Noriega's extradition.

The issues present in *Boumediene v. Bush*, __ U.S. __, 128 S.Ct. 2229 (2008), concerning the constitutionality of § 7 of the MCA, are not presented by § 5 of the MCA, the provision at issue here, as the parties concede. In *Boumediene*, the Supreme Court found § 7 of the MCA, which explicitly removed the jurisdiction of courts to consider habeas actions by enemy combatants, to be unconstitutional. *Id.* at 2242-44, 2275. The Court determined that the petitioners could not be prevented from seeking the writ because of their status as enemy combatants or detention in Guantanamo Bay, and therefore they were entitled to the constitutional privilege of habeas corpus. *Id.* at 2262. The Court further held that the procedures for reviewing the status of a detainee under the Detainee Treatment Act of 2005, Pub.L. No. 109-148, Div. A, Tit. X, § 1005, 119 Stat 2680, 2740-44, note following 10 U.S.C. § 801 (2005 ed., Supp. V), were not an adequate and effective substitute for the habeas writ. *Id.* at 2274. Section 5, in contrast, as discussed more fully, *infra*, at most changes one substantive provision of law upon which a party might rely in seeking habeas relief. We are not presented with a situation in which

potential petitioners are effectively banned from seeking habeas relief because any constitutional rights or claims are made unavailable.

STANDARD OF REVIEW

On review of a denial of a habeas petition regarding the issuance of a certification of extraditability, we review factual findings for clear error and questions of law de novo. *Kastnerova v. United States*, 365 F.3d 980, 984 (11th Cir. 2004).

DISCUSSION

I. Extradition Principles

Extradition is an executive function derived from the President's power to conduct foreign affairs, and the judiciary historically has played a limited role in extradition proceedings. *Martin v. Warden, Atlanta Pen*, 993 F.2d 824, 828 & n. 6 (11th Cir. 1993); *see also Terlinden v. Ames*, 184 U.S. 270, 288 (1902) ("[T]he question whether power remains in a foreign state to carry out its treaty obligations is in its nature political and not judicial, and . . . the courts ought not . . . interfere with the conclusions of the political department in that regard.").

The United States' authority to extradite Noriega comes from the United States' extradition treaty with France. The federal extradition statute generally permits extradition when based on a treaty or

convention. *See* 18 U.S.C. § 3184. Article 1 of the extradition treaty between the United States and France, entitled "Obligation to Extradite," states that "[t]he Contracting States agree to extradite to each other, pursuant to the provisions of this Treaty, persons whom the competent authorities in the Requesting State have charged with or found guilty of an extraditable offense." Extradition Treaty, U.S.-Fr., art. 1, Apr. 23, 1996, S. Treaty Doc. No. 105-13 (2002). The treaty further defines an extraditable offense as one "punished under the laws in both States by deprivation of liberty for a maximum of at least one year or by a more severe penalty." *Id.* at art. 2(1). The offense of which Noriega has been convicted *in absentia* in France, which corresponds to money laundering in the United States, undoubtedly falls within the purview of the treaty.[6]

There is no right to appeal extradition certification determinations, *see Kastnerova*, 365 F.3d at 984 n.4, and collateral review of an extradition determination by means of a petition for writ of habeas corpus is generally limited "to determining 'whether the magistrate had jurisdiction, whether the offense charged is within the treaty and, . . . whether there was any evidence

6. Noriega was charged with violations under French law of engaging in financial transactions with the proceeds of illegal drug trafficking, in violation of section 415 of the French Customs Code (Law 88-1149 of December 23, 1998, promulgated on December 28, 1988). Money laundering is a felony punishable in the United States by up to twenty years' imprisonment. *See* 18 U.S.C. § 1956(a). The parties do not dispute the applicability of the Extradition Treaty to either provision.

warranting the finding that there was reasonable ground to believe the accused guilty.' " *Martin*, 993 F.2d at 828 (quoting *Fernandez v. Phillips*, 268 U.S. 311, 312 (1925)). The issue of whether the treaty of extradition has no force because another treaty or law prevents its operation is no less a fundamental one than is treaty coverage of the offense charged, and is within the class of reviewable challenges to extradition. *See, e.g., Valenzuela v. United States*, 286 F.3d 1223, 1229 (11th Cir. 2002) (noting that despite the court's "limited role in extradition proceedings, the judiciary must ensure that the constitutional rights of individuals subject to extradition are observed"); *Yapp v. Reno*, 26 F.3d 1562, 1565 (11th Cir. 1994) (concluding that the court was still required to interpret a provision of the applicable extradition treaty regardless of the limited scope of habeas corpus review in extradition proceedings); *Ahmad v. Wigen*, 910 F.2d 1063, 1064-65 (2d Cir. 1990) (adhering to the limited role of habeas corpus in extradition proceedings but still considering whether the government's conduct violated the Constitution or established principles of international law). Noriega has failed to assert any applicable law which would prevent his extradition to France under the Extradition Treaty.

We find it unnecessary to resolve the question of whether the Geneva Conventions are self-executing,[7]

---

7. By "self-executing," we mean "that the treaty has automatic domestic effect as federal law upon ratification." *Medellin v. Texas*, __ U.S. __, 128 S.Ct. 1346, 1356 n.2 (2008). In *Johnson v. Eisentrager*, 339 U.S. 763 (1950), the Supreme (Cont'd)

because it is within Congress' power to change domestic law, even if the law originally arose from a self-executing treaty. *See Medellin*, 128 S.Ct. at 1359 n. 5 ("Whether or not the United States 'undertakes' to comply with a treaty says nothing about what laws it may enact. The United States is *always* 'at liberty to make . . . such laws as [it] think[s] proper.'" (quoting *Todok v. Union State Bank of Harvard, Neb.*, 281 U.S. 449, 453(1930))).

(Cont'd)

Court appeared wary of finding the 1929 Convention-the predecessor to the 1949 Conventions-self executing:

> It is . . . the obvious scheme of the Agreement that responsibility for observance and enforcement of these rights is upon political and military authorities. Rights of alien enemies are vindicated under it only through protests and intervention of protecting powers as the rights of our citizens against foreign governments are vindicated only by Presidential intervention.

Id. at 789 n.14. In *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), however, the Court referred to this footnote as a "curious statement suggesting that the Court lacked power even to consider the merits of the Geneva Convention argument." *Id.* at 627. In discussing the adequacy of military commissions the Court did not resolve the issue of whether the Geneva Conventions were self-executing, but rather, found that even if the scheme of the Geneva Conventions "would, absent some other provision of law, preclude [the] invocation of the Convention's provisions as an independent source of law binding the Government's actions and furnishing petitioner with any enforceable right," the rights at issue were "part of the law of war" and made applicable by statute. *Id.* at 627-28.

That is, because "'an Act of Congress . . . is on a full parity with a treaty, . . . when a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null.'" *Breard v. Greene*, 523 U.S. 371, 376 (1998) (quoting *Reid v. Covert*, 354 U.S. 1, 18 (1957)) (finding that petitioner's claim for relief based on violations of the Vienna Convention on Consular Relations was subject to later enacted Antiterrorism and Effective Death Penalty Act); *see also Medellin*, 128 S.Ct. at 1359 n. 5 ("Indeed, a later-in-time federal statute supersedes inconsistent treaty provisions."). Thus, as discussed below, while the United States' international obligations under the Geneva Conventions are not altered by the enactment of § 5 of the MCA, Congress has superseded whatever domestic effect the Geneva Conventions may have had in actions such as this.

II. Section 5 of the Military Commissions Act

The parties' dispute centers on the extent to which § 5 removes an individual's ability to invoke the Conventions in a civil action against the United States, including a habeas proceeding. Section 5 of the MCA provides:

> No person may invoke the Geneva Conventions or any protocols thereto in any habeas corpus or other civil action or proceeding to which the United States, or . . . agent of the United States is a party as a

> source of rights in any court of the United States or its States or territories.

MCA, § 5(a).

Noriega maintains that while under § 5 he cannot invoke the Third Geneva Convention as a source of individual rights in a judicial proceeding, "his right to enforce the provisions of the Geneva Convention against the Secretary of State, the Bureau of Prisons, or the Department of Justice [is] in no way abrogated." (Appellant's Reply Br. 15.) Thus, Noriega argues that article 118 of the Third Geneva Convention mandates that he be immediately repatriated to Panama, as his term of imprisonment in the United States is complete. *See* Third Geneva Convention art. 118 ("Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities."). The Government maintains that § 5(a) of the MCA precludes invocation of the Third Geneva Convention in this proceeding, as § 5(a) "codified the principle that the Geneva Conventions [are] not judicially enforceable by private parties," and that regardless, the Third Geneva Convention authorizes his continued detention pending his extradition for criminal proceedings in France. (Appellees' Br. 14 n.6, 15.)

Despite Noriega's arguments to the contrary, it appears that Noriega is invoking the Third Geneva Convention as a source of rights—the alleged right to immediate repatriation under article 118. While the legal effect of § 5 has not been widely discussed, the plain

language of § 5 prohibits exactly this type of action.[8] The district court appears to have read § 5 similarly, noting that § 5 "attempts to remove entirely the protections of the Convention from any person, even a citizen of the United States, in any American courtroom whenever the United States is involved." *Noriega II*, 2007 WL 2947572, at *4. The Court of Appeals for the District of Columbia Circuit has also suggested that the language of § 5 is unambiguous. *See Boumediene v. Bush*, 476 F.3d 981, 988 n. 5 (D.C. Cir. 2007) (concluding that "[s]ection 7 [of the MCA] is unambiguous, as is section 5(a)"), *rev'd* __ U.S. __, 128 S.Ct. 2229, 171 L.Ed.2d 41 (2008) (holding that § 7 unambiguously eliminates habeas jurisdiction but is unconstitutional).

These readings of § 5(a) are consonant with the MCA's legislative history, which further suggests that the express language of § 5 was understood to preclude individuals from invoking the Geneva Conventions as a source of rights. *See, e.g.*, H.R.Rep. No. 109-731 (2006) ("Section 5 of the MCA clarifies that the Geneva Conventions are not an enforceable source of rights in any habeas corpus or other civil action or proceeding by an individual in U.S. courts."); H.R.Rep. No. 109-664(II) (2006) (noting that the section "would prohibit any court from treating the Geneva Conventions as a source of rights, directly or indirectly, making clear that the Geneva Conventions are not judicially enforceable

---

8. The title of § 5, "Treaty Obligations Not Establishing Grounds for Certain Claims," indicates that the section clarifies or changes the domestic effect of the Geneva Conventions.

in any court of the United States"); 152 Cong. Rec. S10354-02, S10400 (daily ed. Sept. 28, 2006) (statement of Sen. Kennedy) ("[T]he bill expressly states that the Geneva Conventions cannot be relied upon in any U.S. court as a source of rights."); *id.* at S10414 (statement of Sen. McCain) ("[This legislation] would eliminate any private right of action against our personnel based on a violation of the Geneva Conventions.").

Accordingly, the plain language of § 5 of the MCA, which is clearly supported by its legislative history, precludes Noriega's Geneva Convention claims. As the Geneva Convention is Noriega's only substantive basis for relief he has failed to state a claim upon which habeas relief could be granted.

III. The Third Geneva Convention

Nevertheless, assuming arguendo that the Third Geneva Convention is self-executing and that § 5 of the MCA does not preclude Noriega's claim, we agree with the district court that the Third Geneva Convention does not prevent Noriega's extradition to France and that the United States has fully complied with its obligations under the Convention.

Articles 118 and 119 of the Third Geneva Convention set forth the permissible duration for the detention of prisoners of war. Article 118 provides, in pertinent part, that "[p]risoners of war shall be released and repatriated without delay after the cessation of active hostilities." Third Geneva Convention art. 118. Article 119 further

qualifies that "[p]risoners of war against whom criminal proceedings for an indictable offence are pending may be detained until the end of such proceedings, and, if necessary, until the completion of the punishment. The same shall apply to prisoners of war already convicted for an indictable offence." *Id.* at art. 119. As a result of Noriega's conviction in the United States, article 119 authorized the United States to prolong his detention for the duration of his sentence-beyond the cessation of hostilities between the United States and Panama. Nowhere, however, is it suggested that a prisoner of war may not be extradited from one party to the Convention to face criminal charges in another. Nor do the stated purposes of articles 118 and 119, as reflected by their commentary, preclude detention in these circumstances: article 118 is intended to prohibit "prolong [ed] war captivity," while article 119 unambiguously reflects the intention of the drafters to permit detention of prisoners of war subject to criminal proceedings. 3 Int'l Comm. of Red Cross, Commentary: Geneva Convention Relative to the Treatment of Prisoners of War 541, 556 (J. Pictet ed.1960).

Article 12 further supports the principle that repatriation is not automatic. Article 12 provides that "[p]risoners of war may only be transferred by the Detaining Power to a Power which is a party to the Convention and after the Detaining Power has satisfied itself of the willingness and ability of such transferee Power to apply the Convention." Third Geneva Convention art. 12. As France and the United States are both parties to the Third Geneva Convention, and

"the United States sought and obtained from the Republic of France specific information regarding all of the rights that the defendant will be guaranteed by France upon his extradition," *Noriega III*, 2007 WL 2947981, at *1, these conditions have been satisfied.[9] The text of article 12 imposes no further limitations on the ability to extradite prisoners of war, and nothing in article 12 implies that a contracting party cannot abide by a valid extradition treaty and extradite a prisoner of war to another contracting party simply because the person is a prisoner of war.

Noriega maintains, however, that the omission of the term "extradition" in article 12 demonstrates that extradition is not permitted under the article, and that the district court erred in looking to article 45 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 ("Fourth Geneva Convention"), to define the term "transfer" as used in article 12 of the Third Geneva Convention. While article 12 of the Third Geneva Convention is silent as to extradition, article 45 of the Fourth Geneva Convention, which parallels article 12 and provides for the transfer of civilians between parties to the Convention, specifically notes that nothing in this article "constitute [s] an obstacle to the

9. The United States did not ask France to declare Noriega a prisoner of war because of the risk that France would interpret the Geneva Conventions differently from the interpretation of the United States. *Id.* Instead, the United States confirmed that France would afford Noriega the same benefits he has enjoyed during his confinement in the United States. *Id.*

extradition, in pursuance of extradition treaties concluded before the outbreak of hostilities, of protected persons accused of offences against ordinary criminal law." Fourth Geneva Convention art. 45. The district court noted the commentary's definition of the term "transfer" as used in article 45 as "internment in the territory of another Power, repatriation, the returning of protected persons to their country of residence or their extradition." *Noriega II*, 2007 WL 2947572, at *2 (quoting 4 Int'l Comm. of Red Cross, Commentary: Geneva Convention Relative to the Protection of Civilian Persons in Time of War 266 (J. Pictet ed.1958)). We agree with the district court that while the purposes behind the Third and Fourth Geneva Conventions may be different, it is still "compelling that the convening parties expressed an understanding of the term 'transfer' which included extradition." *Noriega II*, 2007 WL 2947572, at *2. To conclude otherwise would mean that a country would be obligated to extradite a civilian, but not a prisoner of war, when they are facing identical criminal charges. We are hesitant to imply such an inconsistent result, particularly when both articles permit the transfer of prisoners of war or civilians under the same limited restraints.[10]

---

10. Further, nothing in the Convention indicates that by obligating contracting parties to prosecute or extradite war criminals under article 129, contracting parties cannot also comply with their preexisting obligations to extradite individuals accused of other criminal charges under valid extradition treaties with other countries. *See* Third Geneva Convention art. 129. As Noriega is not alleged to have committed grave breaches of the Third Geneva Convention, article 129 is inapplicable here.

Accordingly, should any doubt exist as to the principal holding here, Noriega's habeas petition would also be denied because extradition would not violate Noriega's rights under the Third Geneva Convention.

CONCLUSION

For the foregoing reasons, the judgment of the district court is AFFIRMED.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA DENYING WRITS OF HABEAS CORPUS DATED SEPTEMBER 7, 2007

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO.: 07-CV-22816-PCH
Magistrate Judge Simonton

GENERAL MANUEL ANTONIO NORIEGA,

Petitioner,

v.

GEORGE PASTRANA,
WARDEN, F.C.I. MIAMI,

and

COND LEZZA RICE,
SEC RETARY OF STATE
UNITED STATES
DEPARTMENT OF STATE,

Respondents.

ORDER DENYING WRITS OF HABEAS CORPUS

THIS CAUSE is before the Court on Manuel Antonio Noriega's Petition for Writ of Habeas Pursuant to 28 U.S.C. § 2241; Mandamus Pursuant to 28 U.S.C. § 1361; and Other Appropriate Relief Pursuant to

28 U.S.C. § 1651 ("Petition"). The Court has reviewed the Petition, the Respondents' Opposition to Petition, Petitioner's Reply Memorandum and relevant portions of the record in this case, as well as those of the related criminal case, *United States of America v. Noriega*, Case No. 88-0079-CR-Hoeveler. In addition, the Court heard oral argument on December 13, 2007, and January 8, 2008. This case involves a unique set of circums-:ances bringing into play the United States' rights and duties under the Geneva Convention Relative to the Treatment of Prisoners of War, August 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 ("Convention") and those under the extradition treaties with France. In summary, Petitioner asks that the Court prohibit his extradition to France pursuant to the Certification of Extraditiability and Order of Commitment entered by Magistrate Judge William C. Turnoff dated August 29, 2007, in case Misc. No. 07-21830. Petitioner contends that having been designated in the related criminal case as a prisoner of war, subject to the Convention, he may not be extradited to France. Rather, Petitioner contends, he must be repatriated to Panama immediately upon his release from federal prison.

The Respondents argue first that this Court is without authority to stay Petitioner's extradition to France. Alternatively, they argue that on the merits, Petitioner is not entitled the relief sought because the Convention permits Petitioner's transfer by extradition to France. For the reasons discussed below, the Court denies the Petition.

Appendix B

While the present case was just recently filed, the related criminal case has a long and complex history, the relevant portions of which follow: On February 4, 1988, a federal grand jury in the outhem District of Florida returned a twelve-count indictment against Petitioner and fifteen co-def dants. Petitioner was charged in eleven counts with: RICO and RICA conspiracy (18 U.S.C. § 1962 c) and (d)) (Counts 1 and 2); conspiracy to import and distribute cocaine (21 U.S.C. § 963)(CDunts 3 and 9); distribution of cocaine (21 U.S.C. § 959) (Counts 4, 5, and 10); manufacture of coca ne (21 U.S.C. § 959) (Count 6); conspiracy to manufacture, distribute, and import cocaine (21 U..C. § 963) (Count 7); and unlawful travel to promote a business enterprise involving cocaine (18 U.S.C. § 1952(a)(3)) (Count 11 and Count 12 were dismissed prior to trial).

Petitioner was arrested in Panama in January of 1990. During the criminal proceedings, the presidi g judge, the Honorable William M. Hoeveler, designated Petitioner a prisoner of war to be accorded the benefits conferred on prisoners of war by the Convention. In April 1992, he was convicted on Counts 1-7 and 11 and found not guilty on Counts 9 and 10. Petitioner was sentenced to concurrent terms of twenty years' imprisonment on Counts 1 and 2, to b followed by concurrent terms of fifteen years' imprisonment on Counts 3-7 and a consecutive term of five years' imprisonment on Count 11. Petitioner was ordered to serve concurrent terns of three years' special parole as to Counts 3-7. On March 4, 1999, the District Court reduced Petitioner's sentence to thirty years'

imprisonment. Petitioner was scheduled to be released on parole en September 9, 2007.

On July 17, 2007, the United States filed a complaint for the extradition of Petitioner, at the request of the government of the France, pursuant to its extradition treaty with the United States. Petitioner has been convicted *in absentia* in France on charges of engaging in financial transactions with the proceeds of illegal drug trafficking. It appears, and Petitioner does not dispute that he will, upon his surrender to France, have an opportunity to challenge the *in absentia* conviction and seek a new trial.

On July 23, 2007, Petitioner filed a Petition for Writs of Habeas Corpus, Mandamus, and Prohibition in the related criminal case seeking an order that the Magistrate judge immediately cease and desist with any proceedings on the extradition complaint. Petitioner Ergued that the requested ion violated his rights under the Third Geneva Convention (Geneva III). That petition for habeas corpus was brought under 28 U.S.C. § 2255. After a hearing on August 13, 2007, oeveler denied the petition for lack of jurisdiction because § 2255 "applies to challenges the sentence imposed, and [Noriega] has not cited any defect in this Court's sentence as to [him]." Because of the pendency of the extradition proceedings, and the imminency of Petitioner's release from federal prison, and the expectation Petitioner would immediately re-file his petition proper under 28 U.S.C. § 2241, Judge Hoeveler analyzed at length th relevant facts and law relating to

Petitioner's claim. Judge Hoeveler then concluded that, if he did have jurisdiction over Petitioner's petition, he would have denied it on the merits. Among his other conclusions, Judge Hoevelr stated that "a strict adherence to the terms of [Geneva III], both as to the letter and the spirit of the Convention, does not mandate immediate repatriation but rather supports a decision that Defendant must face those charges which are legitimately brought against him by other parties to the Convention, so long as our international obligations under the Convention are being met." *United States v. Noriega*, 2007 WL 2947572, *4 (S.D. Fla. Aug. 24, 2007) (Noriaga II).

Petitioner did not file an appeal of that order prior to the extradition rearing which took place on August 28, 2007 before Magistrate Judge Turnoff. Following that hearing, Magistrate Judge Turnoff issued a Certificate of Extraditiability on August 29, 2007.[1]

On September 5, 2007, again in the related criminal case, Petitioner filed an Emergency Motion for Stay of Extradition and a Petition for Writ of Habeas Corpus Pursuant to 27 U.S.C. § 2241. In those pleadings, Petitioner asserted that the United States had failed to comply with the requirements of Article 12 of Geneva III in that it failed to satisfy itself of France's willingness and ability to designate Petitioner as a prisoner of war and to apply the Convention. That same day, Judge

---

1. Petitioner does not challenge the adequacy of the extradition proceeding, only compliance with the Convention.

Hoeveler granted the Emergency Motion for Stay, in part, ordering Petitioner to present credible evidence in support of the claims made in his Petition for Writ of Habeas Corpus. In response, the parties submitted their respective proofs and legal arguments.

On September 7, 2007, Judge Hoeveler issued an order dismissing; the Petition for Writ of Habeas Corpus and lifting the stay of extradition. Once again, Judge Hoeveler held that he did not have jurisdiction to rule on Petitioner's habeas petition. As Judge Hoeveler noted, the proper method for challenging a certificate of extraditiability is filing a petition for writ of habeas corpus as a new civil action, not filing such a petition as part of a pre-existing criminal case. However, in response to Petitioner's legal arguments, Judge Hoeveler declared that if he had jurisdiction over the petition, he would have denied it on the merits because, "the United States 'had satisfied itself . . . [that Defendant] will be afforded the same benefits that he has enjoyed for the past fifteen years in nce with this Court's 1992 order declaring him a prisoner of war.'" *United States v. Noriega*, 2007 WL 2947981, *1 (S.D. Fla. Sept. 7, 2007) (Noriega III)).[2]

---

2. On September 7, 2007, Petitioner filed two separate notices of appeal. Once notice of appeal ought review of the District Court's August 24, 2007 Order denying his Section 2255 habeas petition. The other notice of appeal sought review of the District Court's September 7, 2007 der denying his § 2441 habeas petition. On October 5, 2007, the Eleventh Circuit Court of App als dismissed the appeal of the September 7, 2007 Order

(Cont'd)

Appendix B

On October 26, 2007, Petitioner filed this Petition. At the December 13, 2007 hearing, Petitioner explained that he filed this Petition due to his concern that the prior two petitions in the related criminal case may have been procedurally flawed in that a civil habeas corpus proceeding may be the only proper way to raise objections to his extradition based on purported violations of the Convention. He wanted to make certain he would not lose his right to appeal because of a procedural error. Nevertheless, at that hearing, Petitioner acknowledged that Judge Hoeveler had, by dicta, thoroughly analyzed the merits of Petitioner's claims based on the then-existing record. While Petitioner disagreed with Judge Hoeveler's conclusions as to the merits, he agreed to this Court's suggestion that it was not necessary for this Court, which agreed with Judge Hoeveler's conclusion on the merits, to draft another lengthy opinion analyzing the relevant facts and law. Both Petitioner and Respondents agreed that, under these circumstances, it would be appropriate for the Court to adopt Judge Hoeveler's analysis as expressed in the August 24, 2007 and September 7, 2007 Orders. However, Petitioner contended that one aspect of his claim required a new look becaus there was new additional evidence indicating that France had not

---

(Cont'd)
for want of prosecution because Petitio er did not pay the docketing and filing fees. On October 17, 2007, Petitioner filed a motion for a certificate of appealability with respect to the pending appeal of the August 24, 2007 Order. The United States filed an opposition to that motion on October 18, 2007. That matter is still pending.

committed to treat Petitioner in accordance with the requirements of the Convention. Petitioner contended that because Judge Hoeveler did not have this new evidence, this Court should reconsider that aspect of Petitioer's claim. The Court and the parties all agreed to this procedure. The Court has proceeded accordingly by reviewing this new evidence relating to Frances's ccmmitment to the State Depa went concerning the benefits to be accorded Petitioner upon his extradition to France.

The Court, after reviewing Petitioner's new evidence, and considering the parties' respective legal memoranda and oral arguments, and for the reasons stated at the January 9, 2008 hearing, finds that the new evidence does not change the result. The Court finds that tale State Department has received an adequate commitment that France will extend to Petitioner, even though he will not be officiary designated a prisoner of war, the benefits required under the Convention and that this meets the requirements of Article 12.[3] In doing so, the Court adopts the findings cf

---

3. At oral argument, Petitioner posited for the first time that even France committed to extend the benefits of the Convention to Petitioner without the designation of prisoner of war, there is no guarantee that France will fulfill that commitment. As the Court observed at the hearing, it is wholly speculative and extremely improbable that France would renege on its diplomatic commitment. First, there is no readily apparent and compelling reason for France not to fully comply. To the contrary, in view of the mutually advantageous and long-

(Cont'd)

facts, the legal analysis and conclusions of law relating to the merits of Petitioner's claims, set firth in Judge Hoeveler's August 24, 2007 and September 7, 2007 Orders.[4] For the reasons set Forth in those Orders, as vented by the findings announced by the Court at the January 9, 2008 hearing, the Court concludes that Petitioner has failed to carry his burden of showing that 1e is entitled to the relief sought by his Petition.

The Conventions do not bar Petitioner's extradition to France in accordance with the Certificate of Extraditiability issued, and the United States has sufficiently complied with Article 12 of the Third Geneva Convention prior to Petitioner's extradition. Accordingly, the Petition is denied, this case is dismissed and the Clerk shall close it.

(Cont'd)

standing diplomtic relationship between the United States and France, dating back to this country's War for Independence, it defies logic and common sense to conclude that France would endanger that relatio hip over its treatment of one criminal defendant. Second, even in the unlikely event France' executive branch failed to abide by its commitment, Petitioner v,ould have adequate recours to obtain relief from the United States's State Department and the French courts.

4. Copies of the August 24, 2007 and September 7, 2007 Orders are attached to the Order and by reference made part of this Order.

Appendix B

ORDERED AND ADJUDGED in chambers in Miami, Florida this 14th day of January, 2008.

s/ Paul C. Huck
PAUL C. HUCK
U.S. DISTRICT COURT JUDGE

APPENDIX C — ORDER DISMISSING DEFENDANT'S "PETITION FOR WRIT OF HABEAS CORPUS PURSUANT TO 28 U.S.C. § 2241" AND ORDER LIFTING STAY OF EXTRADITION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA DATED SEPTEMBER 7, 2007

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO: 88-0079-CR-HOEVELER

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MANUEL ANTONIO NORIEGA,

Defendant.

ORDER DISMISSING DEFENDANT'S "PETITION FOR WRIT OF HABEAS CORPUS PURSUANT TO 28 U.S.C. § 2241" AND ORDER LIFTING STAY OF EXTRADITION

THIS CAUSE comes before the Court on the Defendant's Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2241, filed September 5, 2007. The United States has responded in opposition. On September 5, 2007, this Court partially granted Defendant's Emergency Motion for Stay based upon

allegations – which were proven to be untrue – that Defendant was to be released early from serving the sentence imposed by this Court. It now appears that Defendant filed his motion for stay, as well as his petition for habeas, in an attempt to have this Court reconsider its prior conclusion that the Geneva Convention Relative to the Treatment of Prisoners of War, August 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 ("Convention") does not include a ban on extradition of prisoners of war ("POWs").

Defendant has chosen to file this request for reconsideration, i.e., this new petition for habeas according to 28 U.S.C. § 2241, and has filed this petition in the criminal case before this Court, rather than initiating a new action related to the Certification of Extraditability and Order of Commitment issued in the extradition proceeding, Misc. No. 07-21830, on August 29, 2007. While the United States has indicated it does not object to proceeding on this petition as filed, this Court will not consider this petition as a proper challenge to the Certification of Extraditability. Such a challenge must be filed according to the proper procedures, and the judge to whom that challenge is assigned will be the proper authority to determine whether any further stay is required, based upon the Defendant's challenge – if any be raised – to the Certification of Extraditability.

This Court appears to lack jurisdiction according to 28 U.S.C. § 2241 to decide Defendant's claims regarding potential future circumstances involving his treatment

in France. Defendant has not demonstrated any problems with the current conditions under which he is serving the sentence imposed by this Court.[1]

Even if this Court had jurisdiction over Defendant's petition, the Court would not find error in the issuance of the Certification of Extraditability based upon the arguments presented by Defendant as of this date. Article 12 of the Convention requires that the United States satisfy itself "of the willingness and ability of [France] to apply the Convention," and the Convention requires respect for a POW's status. While the United States' assertions are somewhat peculiar, it is nevertheless the case that the United States "has satisfied itself . . . [that Defendant] will be afforded the same benefits that he has enjoyed for the past fifteen years in accordance with this Court's 1992 order declaring him a prisoner of war." Government's Opposition to the Defendant's Petition for Writs of Habeas Corpus, at 1.

It is important to note that the United States did not ask the Republic of France to declare

---

1. The Court's September 5 Order partially granting a stay was entered solely on the basis that, at the time, it appeared that the Defendant had raised, through a petition filed under 28 U.S.C. § 2241, a legitimate question as to the conditions of his present imprisonment, i.e., an early release from custody. As the response by the United States makes clear, there is no question as to this issue. In any event, Defendant shall not be subject to early release from the sentence he is serving under this Court's authority.

> that defendant is a prisoner of war. Instead of running the risk that the Republic of France might interpret the Geneva Conventions differently than the United States, the United States sought and obtained from the Republic of France specific information regarding all of the rights that the defendant will be guaranteed by France upon his extradition. [The] United States has confirmed through its communications with France that France will afford the defendant the same benefits he has enjoyed during his confinement in the United States that were mandated by this Court's Order of December 8, 1992.

Id. at 3. The Court's reading of the assertions of the Assistant United States Attorney, supported by the Declaration of Clifton M. Johnson, the head of the Office of the Legal Adviser of the United States Department of State, indicates that Defendant retains all of his rights under the Convention. "France does indeed intend to afford [Defendant] all the same rights that he was afforded during his incarceration in the United States;" these specific rights are those "to which Noriega was entitled under this Court's ruling **and** as specified in Geneva III." Declaration, ¶ 4 (emphasis added). Regardless of the unique nature of this Defendant, his POW status attached at least as early as December 1992

and he retains that status "until [his] repatriation," Convention, art. 5;[2] to consider this Defendant as anything less than a POW would not constitute compliance with the Geneva Convention. This Court notes the United States' assertions that the Convention is being followed, and anticipates full compliance with the Convention based upon those assertions.

Further, it bears observation that Defendant's submitted "evidence" of France's alleged unwillingness to apply the Convention consists of hearsay, and is based entirely upon news reports – many of which lack any evidence of certified translations to English from the language in which they first appeared – rather than direct information from official sources. Defendant certainly had the ability to contact the alleged speaker, the French ambassador to Panama, directly and request a sworn statement; however, no such statement was provided. Further, the most inconsistent statement, i.e., that Defendant "will not enjoy the privileges [of his POW status]," purportedly made by the Ambassador on July 26, 2007, was prior to this Court's Order of August 24. The Defendant's own submission, again relying solely on news reports, admits that the "French Foreign Ministry . . . stated that General Noriega will receive the same privileges he received in the United States."

Defendant has suggested that this Court did not consider certain arguments raised in his earlier

---

2. POWs also retain the benefits of the Convention even if convicted as to acts committed prior to capture. Convention, art. 85.

unsuccessful petition for habeas before this Court. Defendant asserts that Article 12 "was intended to apply to transfers between allied Powers during war" and argues that its only purpose is for such transfers. This Court disagrees, and already considered this argument fully, particularly in the context of the criminal charges pending against this Defendant. A POW's responsibility for criminal charges, including those unrelated to the conflict, clearly is envisioned in Articles 85 and 119 of the Convention. Moreover, Defendant's argument is not consistent with the statements in the Commentary, International Committee of the Red Cross, Commentary on the Geneva Conventions (J. Pictet, ed., 1960), upon which he relies. Indeed, the Commentary reveals that Article 12 was "largely based" on the experience of the United States and France in accommodating United States-captured German POWs in France where there was a shortage of food. The United States responded to concerns of the International Committee of the Red Cross by providing food and clothing to France for distribution to its own POW camps such that the German POWs would have their needs met. Commentary, art. 12, n 14.[3] There is no statement in the Commentary that suggests that the United States' obligation at that time would have been any different if the German POWs were interred in a POW camp in a nation which was not a co-

3. The Court also notes that Defendant retains the right, according to Article 12, "if [France] fails to carry out the provisions of the Convention in any important respect," to petition the United States, either directly or through a "Protecting Power," to "take effective measures to correct the situation." Convention, art. 12.

belligerent of the United States. The reference at the beginning of the Commentary to Article 12 to "the special case of the transfer of prisoners from one belligerent Power to another" does not suggest that Article 12 itself only applies to such transfers; nor does it suggest that Article 12 prohibits otherwise valid extraditions. In summary, nothing from the Defendant compels this Court to change its prior conclusion that the Convention does not prohibit legitimate extraditions conducted in compliance with Article 12.

As there is no basis for continuing the stay imposed by this Court, that stay is lifted as of 5:00 p.m. today, with the understanding that Defendant will complete the term of his previously imposed sentence and not be released until September 9, 2007.

DONE AND ORDERED in chambers in Miami, Florida, this 7th day of September, 2007.

s/ William M. Hoeveler
WILLIAM M. HOEVELER
Senior United States District Judge

APPENDIX D — ORDER DENYING DEFENDANT'S PETITION FOR WRITS OF HABEAS CORPUS, MANDAMUS. AND PROHIBITION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA ENTERED AUGUST 24, 2007

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO: 88-0079-CR-HOEVELER

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MANUEL ANTONIO NORIEGA,

Defendant.

ORDER DENYING DEFENDANT'S PETITION FOR WRITS OF HABEAS CORPUS, MANDAMUS. AND PROHIBITION

THIS CAUSE comes before the Court on the Defendant's Petition for Writs of Habeas Corpus, Mandamus, and Prohibition, filed July 23, 2007. This Court heard argument from counsel on August 13, 2007.

When this Court determined fifteen years ago that Defendant was a "prisoner of war" (POW), according to the Geneva Convention Relative to the Treatment of

Appendix D

Prisoners of War, August 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 ("Convention"), *United States v. Noriega*, 808 F. Supp. 791, 803 (S.D. Fla. 1992), it did so primarily in the context of Defendant's concerns about the care he would receive while in custody.[1] It would have been impossible to predict the full course of events which have brought the parties back before this Court, but some of those circumstances are far from surprising. For example, Defendant's allegedly illegal activities were never understood by this Court to be limited to the United States, nor to Panama, and, thus, it was conceivable that an extradition request might be made at some future time. Indeed, the charges which form the basis of the extradition proceedings currently pending against Defendant, pursuant to a Complaint filed by the United States in Case No. 07-2183MC UNA, relate to alleged money laundering activities which occurred in France from 1988-89, and it may be that other countries will be interested in bringing charges against the Defendant.[2]

---

1. In an Amended Judgment signed on February 4, 1993, Docket No. 1519, the Court included its "recommendation" regarding Defendant's status as a POW with respect to his confinement.

2. At the time of the invasion of Panama, $5.8 million was seized from Defendant's home in Panama City, and $20 million in 27 bank accounts was "frozen by various foreign governments at the request of the United States." *United States v. Noriega*, 746 F. Supp. 1541, 1542 (S. D. Fla. 1990).

Despite the context of the Court's initial consideration of the POW claims,[3] once the status of POW attaches, it protects the individual POW until "final release and repatriation." Article 5, Convention. Defendant's status as a POW, however, does not change the fact that Defendant presently is incarcerated according to a valid sentence imposed by this Court. The Court's authority at this time, therefore, is properly directed toward the validity of the sentence being served, which may be challenged by reference to 28 U.S.C. § 2255,[4] or the execution of that sentence, which may be challenged by reference to 28 U.S.C. § 2241.[5]

Defendant has demonstrated no basis for a writ of prohibition, nor a writ of mandamus. The only remaining question is whether Defendant is entitled to a writ of

---

3. The Court also considered the POW issue in making an initial determination that none of the Convention's provisions divested this Court of jurisdiction over the Defendant. *United States v. Noriega*, 746 F. Supp. 1506, 1529 (S.D. Fla. 1990).

4. According to 28 U.S.C. § 2255, a prisoner in custody under sentence of this Court may move "to vacate, set aside or correct the sentence." 28 U.S.C. § 2255 is a "statutory means by which an individual under federal sentence can obtain federal habeas corpus review of the sentence imposed." *United States v. Jordan*, 915 F.2d 622 (11th Cir. 1990).

5. Challenges to the execution of a sentence, rather than to the sentence itself, are to be brought as habeas petitions under 28 U.S.C. § 2241. *See, e.g., Bishop v. Reno*, 210 F.3d 1295, 1304 n14 (11th Cir. 2000).

habeas corpus – but first this Court must determine whether it has jurisdiction to consider this matter. As 28 U.S.C. § 2255 applies to challenges against the sentence imposed, and Defendant has not cited any defect in this Court's sentence as to this Defendant, there is no basis for the exercise of jurisdiction under this statute.[6] As the petition before the Court purports to rely on 28 U.S.C. § 2255, it therefore is subject to summary dismissal. However, in light of the circumstances presented by this case, including the fact of an imminent hearing in the extradition proceeding, and Defendant's planned release from custody in two weeks, the Court offers several observations as to the availability of habeas relief under 28 U.S.C. § 2241, in the event that Defendant seeks immediately to refile his petition before this Court under 28 U.S.C. § 2241. The Court does so with the awareness that the question of such relief is not before the Court and, thus, none of the following need be reached at this time.[7]

While 28 U.S.C. § 2241 provides the authority to issue writs of habeas corpus, such a writ may only issue, of course, when a petitioner demonstrates entitlement to that relief; if the question were before this Court at

---

6. 28 U.S.C. § 2255 provides the statutory basis for a claim by a federal prisoner that his constitutional rights were violated during his federal prosecution, including his sentencing.

7. These observations are made for the benefit of the parties and in the interest of promoting the efficient administration of this matter.

this time, the Court would find that Defendant has demonstrated no such entitlement, as described below.

Defendant asserts that his POW status under the Convention shields him from extradition at this time, citing Article 118 of the Convention, which provides that POWs "shall be released and repatriated without delay after the cessation of active hostilities."[8] In response, the United States argues that extradition to France on the announced charges is consistent with the Convention because of Article 82, which subjects Defendant, as a POW, to the "laws, regulations and orders" of the United States.[9] The United States also relies on Article 12 of the Convention, regarding the transfer of POWs, as supporting the principle that repatriation is not automatic, but rather that transfer is permitted under certain circumstances.[10]

---

8. Defendant also argues that only allies in a particular conflict are entitled to seek extradition of POWs detained during that conflict. The Court finds no such requirement in the Convention or in any other cited source of authority.

9. A prisoner of war shall be subject to the laws, regulations and orders in force in the armed forces of the Detaining Power, the Detaining Power shall be justified in taking judicial or disciplinary measures in respect of any offence committed by a prisoner of war against such laws, regulations or orders." Art. 82, Convention.

10. Article 12 provides, in pertinent part, that POWs "may only be transferred by the Detaining Power to a Power which is a party to the Convention and after the Detaining Power has satisfied itself of the willingness and ability of such transferee Power to apply the Convention."

Appendix D

While the Convention at issue is silent as to extradition, it is notable that one of the other conventions adopted on that same date specifically provides that its protections for civilians (as compared to the Convention's protections for POWs) do not constitute an obstacle "to the extradition, in pursuance of extradition treaties concluded before the outbreak of hostilities, of protected persons accused of offences against ordinary criminal law." Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War art. 45, 12 August 1949, 6 U.S.T. 3516 ("Fourth Geneva"). Moreover, the oft-cited Commentary notes that the term "transfer" as used in this Article may mean "internment in the territory of another Power, repatriation, the returning of protected persons to their country of residence ***or their extradition.***" International Committee of the Red Cross, Commentary on the Geneva Conventions (J. Pictet, ed., 1960) ("Commentary") (emphasis added). While the purposes of the Fourth Convention are different from those of the Third, it is nevertheless compelling that the convening parties expressed an understanding of the term "transfer" which included extradition.[11] Article 45

---

11. The Court does not find compelling the argument that extradition of POWs is prohibited because there is no mention of extradition in the Convention, particularly when the Commentary to the Fourth Convention indicates clearly that extradition is included within the definition of "transfer." In other words, the maxim of statutory interpretation, *expressio unius est exclusio alterius*, need not compel a different result. Indeed, it would be absurd to suggest that a civilian facing the

(Cont'd)

of the convention protecting civilians parallels Article 12 of the convention protecting POWs, and it is not unreasonable to include that Article 12 embodies the same principles – i.e., that transfer of either POWs or "protected persons" is permitted, but that it should only take place between parties to the Conventions to guarantee that the principles embraced in the Conventions will be respected.[12]

(Cont'd)

identical criminal charges, i.e., money laundering in connection with drug trafficking, would be subject to extradition when a POW would not – particularly when the charges have no relation whatsoever to the POW's status as a member of the armed forces of his or her home country.

12. The Commentary to that Article also states that the Fourth Convention:

> was not the place to settle in detail the conditions on which extradition was to take place or the method of carrying it out; such cases must be decided in accordance with the laws and treaties in force. It was nevertheless important to preserve the existing character of extradition as an act of penal procedure and to prevent it serving as a pretext for persecution. The Diplomatic Conference wished to exclude any extradition treaty concluded, for instance, under pressure from a victorious Power. It therefore stipulated expressly that the treaties referred to were those 'concluded before the outbreak of hostilities.

Commentary, Article 45, Fourth Convention. The Court notes that our extradition treaty with France dates to at least 1909, 37 Stat. 1526. *Valentine v. United States*, 299 U.S. 5 (1939).

Appendix D

This Court previously determined that Article 118 of the Convention is limited by Article 119.[13] Article 119 provides that POWS "against whom criminal proceedings for an indictable offence are pending may be detained until the end of such proceedings, and, if necessary, until the completion of the punishment." That provision also applies to POWs "already convicted for an indictable offence." Article 119, Convention. As previously noted by this Court, "[s]ince criminal proceedings are pending against Noriega, Article 119 permits his detainment in the United States notwithstanding the cessation of hostilities." *United States v. Noriega*, 746 F. Supp. 1506, 1528 (S.D. Fla. 1990).

This Court stated:

> [t]he humanitarian character of the Convention cannot be overemphasized, and weighs heavily against Defendants' [including the co-Defendants] applications to the Court.

---

13. Although Article 118 of the Convention provides that POWs "shall be released and repatriated without delay after the cessation of active hostilities," repatriation is not automatic; for example, a POW may refuse to be repatriated and, as noted above, POWs facing criminal prosecution may be detained. Neither is extradition automatic. Procedures established in 18 U.S.C. § 3184 govern the processing of the extradition request, and this Court has full confidence in Magistrate Judge Turnoff's ability to address all relevant issues and to see that the United States abides by all governing treaties and laws, including the Convention.

Appendix D

> The Third Geneva Convention was enacted for the express purpose of protecting prisoners of war from abuse after capture by a detaining power. The essential principle of *tendance liberale*, pervasive throughout the Convention, promotes lenient treatment of prisoners of war on the basis that, not being a national of the detaining power, they are not bound to it by any duty of allegiance. Hence, the 'honorable motives' which may have prompted his offending act must be recognized. That such motives are consistent with the conduct and laws of war is implicit in the principle. Here, the Government seeks to prosecute Defendants for alleged narcotics trafficking and other drug-related offenses - activities which have no bearing on the conduct of battle or the defense of country. The fact that such alleged conduct is by nature wholly devoid of 'honorable motives' renders *tendance liberale* inapposite to the case at bar.

Id. at 1529. Clearly, the facts surrounding this particular Defendant's status as a POW are far different from those expressly considered by the parties to the Convention in 1949.

Defendant is seeking repatriation for a multitude of reasons, not the least of which appears to be that he will be shielded constitutionally from extradition to

France once he returns to Panama. According to the United States' prior filings in this case:

> it is our understanding that Article 24 of the Panamanian Political Constitution of 1983 (like Article 23 of the predecessor Political Constitution of 1972) as well as Panamanian statutory law (Article 2508(1) of the Panamanian Criminal Procedure Code; Article 30(1) of Law No. 23 of December 20, 1986, governing the extradition of persons charged with drug-related offenses) do not permit the use of the extradition process to surrender Panamanian nationals to foreign countries.

Declaration of Mary Ellen Warlow, Associate Director of the Office of International Affairs, Criminal Division, Department of Justice, April 4, 1988, Docket No. 40. The United States has confirmed recently that the Defendant would not be able to be extradited if he is repatriated.[14] Defendant has not always insisted on repatriation; indeed, at one time Defendant himself cited Article 12, and sought removal to a third country.[15]

---

14. During argument, defense counsel stated that he "didn't know" whether that was the case, but the Court accepts the United States' representation.

15. Defendant "hereby invokes Part II, ***Article 12*** and demands that the United States of America transfer him out of their custody to the custody of a willing third country who is a High Contracting Party so that this willing country may have (Cont'd)

Appendix D

The Court previously noted the clear conclusion that Article 12 "limits the ability of the United States to effect such a transfer" by requiring that the receiving country be a party to the Convention and willing to apply the Convention. *Noriega*, 746 F. Supp. at 1527. No other restrictions are provided. Defendant has offered no evidence suggesting that France will fail to abide by the Convention in its treatment of Defendant.[16] According to the United States, Defendant already has been convicted in France on criminal charges, and nothing in the Convention suggests that honoring a treaty between parties to the Convention concerning extradition for a criminal offense is prohibited. As consistently stated by the Eleventh Circuit, "extradition is a function of the Executive." *Kastnerova v. United States*, 365 F.3d 980, 986 (11th Cir. 2004). This Court has a constitutional

---

(Cont'd)
the responsibility of applying each section and article of Geneva Convention III." Ex-Parte Demand to be Transferred to a Neutral Third Party Country, Docket No. 185 (emphasis in original), p 17. Defendant's demand that he be "immediately interred in a third country willing to accept him from which he may be repatriated or released," *id.* at 25, presents the question of what would be the situation if that request had been granted and Defendant had been sent to France. It seems plausible that while France was detaining him, France also could have proceeded with criminal charges against him and, thus, he would be facing those charges in any event.

16. It is clear that France is a party to the Convention and the United States has represented that France will apply the protections of the Convention during the detention and prosecution of the Defendant.

mandate to follow treaties.[17] The United States has elected to pursue the extradition of Defendant to France, rather than his repatriation to Panama, despite a pending claim from Panama for the return of Defendant. It is unclear whether Panama is actively seeking Defendant's return, but in any event, any competing claims for Defendant's extradition are matters for the Secretary of State to resolve.

Because both parties have raised the issue, the Court comments briefly on the argument that the Military Commissions Act of 2006, Pub. L. No. 109-366, § 5(a), Oct. 17, 2006, 120 Stat. 2631 ("Act"), denies Defendant the ability to raise the Convention in a habeas (or any civil) proceeding.[18] This Court's reading of § 5(a)

17. "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority." Article III, Section 2, Constitution.

18. It appears that § 5(a) does not strip a defendant in a federal criminal proceeding such as the present proceeding from his or her rights under the Geneva Convention – unless, of course, the clause "or other civil action or proceeding" is to imply any other type of proceeding, instead of just any other civil proceeding. In § 948b(g) of the Act, Congress expressly limited an "alien unlawful enemy combatant" from invoking the Geneva Convention during a trial by a military commission, but apparently has retained the ability of others to raise the Convention during criminal proceedings in a court. Congress did not adopt the broader language which had been proposed by Senator Frist, which would have eliminated the ability of all persons (including our own soldiers, presumably) to invoke the rights of the Convention in ***any*** proceeding in an American Court. S. 3861, 109th Cong. § 6(b)(1) (2006).

of the Act is that it attempts to remove entirely the protections of the Convention from any person, even a citizen of the United States, in any American courtroom whenever the United States is involved. Clearly, § 5(a) raises concerns, but those are left for another day and another Court – indeed, it appears that the Supreme Court soon will address such issues.

This case is temptingly unique – presenting a plethora of issues, each of which could lead to volumes of analysis, but most of which are not necessary to the Court's decision today. Simply stated, this Court's role at this stage of the proceedings is limited. The temptations here are to expansively comment on the importance of respect for the Convention, particularly those provisions relating to treatment of POWs, yet that is not in dispute, according to the United States.[19] Indeed, the United States assures this Court that the Defendant's POW status remains respected and will continue to be respected even after extradition to France. There is also a temptation to reach the issue of the constitutionality of the Military Commissions Act of 2006, particularly § 5(a) which purports to affect changes to the protections of the Convention – but that argument is only raised in the alternative by the United States and it would be imprudent for this Court to reach that issue at this time.

19. The United States, for example, has informed the International Committee of the Red Cross regarding the French extradition request, as required by Article 104 of the Convention. United States' Supplemental Reply, Docket No. 1708, p. 2.

Appendix D

In conclusion, the Court notes again that "[i]n order to set the proper example and avoid diminishing the trust and respect of other nations," the United States must honor fully its obligations according to the Convention. Respect is earned by being fair and just in the administration of the law. The Defendant, who, according to the United States, is 69 years old,[20] a grandfather, and apparently far removed from his prior criminal activities, was convicted as to a number of extremely serious crimes in this country and has been charged elsewhere with serious crimes. Thus, his present appearances notwithstanding, a strict adherence to the terms of the Convention, both as to the letter and the spirit of the Convention, does not mandate immediate repatriation but rather supports a decision that Defendant must face those charges which are legitimately brought against him by other parties to the Convention, so long as our international obligations under the Convention are being met. Based upon the circumstances and arguments presented by the parties, it appears that in this specific instance examined today as to this very unique Defendant, the United States is doing so.[21]

---

20. The United States reports that Defendant's date of birth is February 11, 1938. Complaint, Case No. 07-21830, p. 4.

21. The decision today is also consistent with Articles 5 and 85 of the Convention, as the United States has represented that Defendant will retain his rights as a POW while in France's custody, i.e., presumably through final repatriation.

Appendix D

This Court never intended for the proclamation of Defendant as a POW to shield him from all future prosecutions for serious crimes he is alleged to have committed. That being said, even the most vile offender is entitled to the same protections as those owed to a law-abiding soldier once they have been declared a POW. It appears that the extradition proceedings should proceed uninterrupted.[22]

Based upon the above, it is

ORDERED AND ADJUDGED that the Defendant's Petition is denied, without prejudice to renew as appropriate in relation to the extradition proceedings themselves.

DONE AND ORDERED in chambers in Miami, Florida, this 24th day of August, 2007.

s/ William M. Hoeveler
WILLIAM M. HOEVELER
Senior United States District Judge

---

22. To the extent that Defendant is unhappy with the outcome of those proceedings, "[a] petition for writ of habeas corpus is a proper method to contest an extradition order because there is no direct appeal in extradition proceedings." *Afanasjev. Hurlburt*, 418 F.3d 1159, 1163 (11th Cir. 2005), citing *Kastnerova*.

Supreme Court, U.S.
FILED
SEP 9 - 2009
OFFICE OF THE CLERK

No. 09-35

In the Supreme Court of the United States

MANUEL ANTONIO NORIEGA, PETITIONER

v.

GEORGE PASTRANA, WARDEN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

ELENA KAGAN
Solicitor General
Counsel of Record
LANNY A. BREUER
Assistant Attorney General
KATHLEEN A. FELTON
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether Section 5 of the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2631, precludes petitioner from invoking the Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, as a source of rights in a habeas corpus proceeding.

2. Whether, assuming petitioner can assert a claim based on the Geneva Convention, his extradition to France would violate the Convention.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 1
Argument 6
Conclusion 12

TABLE OF AUTHORITIES

Cases:

Boumediene v. *Bush*, 128 S. Ct. 2229 (2008) 8
El Al Israel Airlines, Ltds. v *Tsui Yuan Tseng*, 525 U.S. 155 (1999) 11
Hamdan v. *Rumsfeld*, 548 U.S. 557 (2006) 7
Head Money Cases, 112 U.S. 580 (1884) 7
Medellin v. *Texas*, 128 S. Ct. 1346 (2008) 7, 8
Minnesota v. *Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999) 11
Sumitomo Shoji America, Inc. v. *Avagliano*, 457 U.S. 176 (1982) 11
United States v. *Noriega*:
808 F. Supp. 791 (S.D. Fla. 1992) 3
117 F.3d 1206 (11th Cir. 1997), cert. denied, 523 U.S. 1060 (1998) 2

Constitution, treaties and statutes:

U.S. Const.:
Art. I, § 9 (Suspension Clause) 8
Art. VI (Supremacy Clause) 8

Treaties and statutes—Continued: Page

Geneva Convention, July 27, 1929, 47 Stat. 2021 7
Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 11
Art. 45, 6 U.S.T. 3546 11
Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 ..... *passim*
Art. 12, 6 U.S.T. 3328 ..... 5, 9
Art. 118, 6 U.S.T. 3406 ..... 5, 9
Art. 119, 6 U.S.T. 3408 ..... 5, 9
Art. 129, 6 U.S.T. 3418 10
Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600:
§ 5, 120 Stat. 2631 ..... 4, 5, 6, 7, 8
§ 5(a), 120 Stat. 2631 ..... 4, 6
§ 7, 120 Stat. 2635 8
18 U.S.C. 1952(a)(3) 2
18 U.S.C. 1962(c) 2
18 U.S.C. 1962(d) 2
21 U.S.C. 959 2
21 U.S.C. 963 2
28 U.S.C. 2241 4
28 U.S.C. 2255 3

Miscellaneous:

152 Cong. Rec. S10,400 (daily ed. Sept. 28, 2006) 7

Miscellaneous—Continued: Page

H.R. Rep. No. 664, 109th Cong., 2d Sess. Pt. 2 (2006) .. 6, 7
H.R. Rep. No. 731, 109th Cong., 2d Sess. (2006) 7

In the Supreme Court of the United States

No. 09-35

MANUEL ANTONIO NORIEGA, PETITIONER

v.

GEORGE PASTRANA, WARDEN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 564 F.3d 1290. The opinion of the district court (Pet. App. 19a-28a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 8, 2009. The petition for a writ of certiorari was filed on July 7, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After the Government of France requested that petitioner be extradited from the United States, a magistrate judge in the United States District Court for the Southern District of Florida certified that petitioner is subject to extradition under the applicable treaty. The

district court denied petitioner's petition for a writ of habeas corpus claiming that his extradition would violate the Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention), Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, and the court of appeals affirmed. Pet. App. 1a-18a.

1. In 1988, a federal grand jury in the Southern District of Florida returned an indictment charging petitioner with numerous drug-trafficking offenses. At the time, petitioner was the commander of the Panamanian Defense Forces in the Republic of Panama. Panama's president discharged petitioner from his military post, but petitioner refused to accept his dismissal, and he seized power. After petitioner declared that a state of war existed between the United States and Panama, the United States sent armed forces into Panama. Petitioner eventually surrendered to United States military officials, who returned him to Miami to face the drug charges against him. *United States* v. *Noriega*, 117 F.3d 1206, 1209-1210 (11th Cir. 1997), cert. denied, 523 U.S. 1060 (1998).

Following a jury trial, petitioner was convicted of racketeering conspiracy and racketeering, in violation of 18 U.S.C. 1962(c) and (d); conspiracy to import and distribute cocaine, in violation of 21 U.S.C. 963; two counts of distribution of cocaine and one count of manufacture of cocaine, in violation of 21 U.S.C. 959; conspiracy to manufacture, to distribute, and to import cocaine, in violation of 21 U.S.C. 963; and interstate or foreign travel to promote an unlawful enterprise, in violation of 18 U.S.C. 1952(a)(3). He was sentenced to a total of 40 years of imprisonment, but the sentence was later reduced to 30 years. *Noriega*, 117 F.3d at 1210; Pet. App. 2a-3a.

In response to petitioner's concerns about the conditions of his confinement, the district court determined that petitioner is a prisoner of war entitled to the benefits conferred upon prisoners of war under the Third Geneva Convention. *United States* v. *Noriega*, 808 F. Supp. 791, 793-796 (S.D. Fla. 1992). Without agreeing that petitioner should be designated a prisoner of war, the government did not appeal that determination, and it afforded him all the protections of a prisoner of war. *Id.* at 794 n.4.

2. Petitioner was scheduled to be released on parole in September 2007. Pet. App. 3a. On July 17, 2007, at the request of the Government of the Republic of France, the United States filed a complaint for the extradition of petitioner to France under the extradition treaty between the United States and France. *Ibid.* Petitioner had been convicted *in absentia* in France on charges of engaging in financial transactions with the proceeds of illegal drug trafficking. *Id.* at 3a n.2. Upon his surrender to France, petitioner will have an opportunity to seek a new trial. *Ibid.*

3. Petitioner filed a motion in his criminal case under 28 U.S.C. 2255, claiming that his extradition to France would violate his rights under the Third Geneva Convention. The district court denied the motion for lack of jurisdiction because petitioner was not challenging his criminal sentence. The court nevertheless addressed the merits of petitioner's argument and stated that, even if it had jurisdiction, it would deny the motion because the Third Geneva Convention did not bar petitioner's extradition. Pet. App. 36a-50a.

Following the denial of petitioner's motion under Section 2255, a magistrate judge held an extradition hearing and issued a certificate of extraditability. Pet.

App. 23a. Petitioner then filed a petition for a writ of habeas corpus under 28 U.S.C. 2241, once again in his criminal case. The district court again dismissed the petition for failure to file it as a new civil action, but it nevertheless opined that it would have denied the petition on the merits in any event. Pet. App. 29a-35a.

4. Petitioner filed a separate petition for a writ of habeas corpus. The district court denied the petition, adopting the findings of fact and conclusions of law set forth in its earlier orders, and holding that the Third Geneva Convention did not bar petitioner's extradition to France. Pet. App. 19a-28a.

5. The court of appeals affirmed. Pet. App. 1a-18a. For two independent reasons, the court concluded that petitioner had failed to show that the Third Geneva Convention prevented his extradition to France.

First, the court of appeals held that Section 5 of the Military Commissions Act of 2006 (MCA), Pub. L. No. 109-366, 120 Stat. 2631, removed the ability of individuals to invoke the Third Geneva Convention as a basis for relief in a civil action against the United States. Pet. App. 11a-14a. That provision states:

> No person may invoke the Geneva Conventions or any protocols thereto in any habeas corpus or other civil action or proceeding to which the United States, or a current or former officer, employee, member of the Armed Forces, or other agent of the United States is a party as a source of rights in any court of the United States or its States or territories.

MCA § 5(a), 120 Stat. 2631. Based on an examination of the plain language and legislative history of Section 5, the court concluded that petitioner was precluded from

arguing that his extradition would be barred by the convention. *Ibid.*

Second, the court of appeals held that, "assuming arguendo that the Third Geneva Convention is self-executing and that § 5 of the MCA does not preclude [petitioner's] claim," Pet. App. 14a, the Third Geneva Convention did not bar petitioner's extradition to France, and the United States had complied with its obligations under the convention. *Id.* at 14a-18a. Acknowledging that Article 118 of the Third Geneva Convention provides for the prompt repatriation of prisoners of war after the cessation of hostilities, the court noted that Article 119 authorizes the detention of prisoners of war against whom criminal proceedings are pending. Thus, that provision authorized the detention of petitioner for the completion of his criminal sentence in the United States. *Id.* at 14a-15a. And, the court explained, nothing else in the convention suggests "that a prisoner of war may not be extradited from one party to the Convention to face criminal charges in another." *Id.* at 15a. The court found further support for its conclusion in Article 12, which allows for transfer of a prisoner of war from one party to the Convention to another as long as the "Detaining Power has satisfied itself of the willingness and ability of such transferee Power to apply the Convention." *Ibid.* In this case, the court observed, "these conditions have been satisfied." *Id.* at 16a. Finding no other suggestion in the convention that it was meant to prevent a contracting party from abiding by its obligations under extradition treaties, the court concluded that petitioner's extradition "would not violate [his] rights under the Third Geneva Convention." *Id.* at 18a.

ARGUMENT

Petitioner renews his claim (Pet. 7-23) that, because he has been afforded prisoner-of-war status, his extradition to France would violate the Third Geneva Convention. The court of appeals correctly rejected that claim, and its decision does not conflict with any decision of this Court or any other court of appeals. Moreover, the decision below is of limited ongoing significance, because petitioner is the only person currently detained by the United States as a prisoner of war. Further review is not warranted.

1. Section 5 of the MCA provides that "[n]o person may invoke the Geneva Conventions or any protocols thereto in any habeas corpus or other civil action or proceeding to which the United States, or * * * agent of the United States is a party as a source of rights in any court." MCA § 5(a), 120 Stat. 2631. Petitioner's habeas corpus petition sought to invoke the Third Geneva Convention "as a source of rights" preventing his extradition, and it was therefore precluded by the plain language of Section 5.

Petitioner suggests (Pet. 10) that Section 5 applies only to certain rights under the convention, such as "the right to counsel, the right to confront ones accusers, [and] the right to know the charges against one," but that it does not address the rights he seeks to invoke. That limited reading finds no support in the text of Section 5, and, as the court of appeals noted, it is also inconsistent with the legislative history. Pet. App. 13a-14a. That history shows that Congress intended Section 5 to "prohibit any court from treating the Geneva Conventions as a source of rights, directly or indirectly, making clear that the Geneva Conventions are not judicially enforceable in any court of the United States." H.R. Rep.

No. 664, 109th Cong., 2d Sess. Pt. 2, at 17 (2006); see H.R. Rep. No. 731, 109th Cong., 2d Sess. 39 (2006) ("Section 5 of the MCA clarifies that the Geneva Conventions are not an enforceable source of rights in any habeas corpus or other civil action or proceeding by an individual in U.S. courts."); 152 Cong. Rec. S10,400 (daily ed. Sept. 28, 2006) (statement of Sen. Kennedy) ("[T]he bill expressly states that the Geneva Conventions cannot be relied upon in any U.S. court as a source of rights.").

Petitioner contends (Pet. 11) that the court of appeals' interpretation of Section 5 of the MCA results in the "complete repudiation of the Geneva Convention." That is incorrect. A treaty is "primarily a compact between independent nations," and its enforcement is generally a matter of international negotiations, not a subject of redress in domestic courts. *Head Money Cases*, 112 U.S. 580, 598 (1884); see *Medellin* v. *Texas*, 128 S. Ct. 1346, 1357 & n.3 (2008). This Court has not decided whether the Third Geneva Convention conferred judicially enforceable rights on individuals before the MCA was enacted, see *Hamdan* v. *Rumsfeld*, 548 U.S. 557, 626-628 (2006), and the court of appeals had no occasion to resolve that question in this case, Pet. App. 9a-11a. Whatever the domestic effect of the Third Geneva Convention before the enactment of the MCA, the court of appeals correctly recognized that "it is within Congress' power to change domestic law, even if the law originally arose from a self-executing treaty." *Id.* at 9a-10a; see *Medellin*, 128 S. Ct. at 1359 n.5 ("[A] later-in-time federal statute supersedes inconsistent treaty provisions."). And, as the court of appeals made clear, its reading of Section 5 of the MCA does not change the international obligations of the United States under the

Geneva Conventions. Pet. App. 11a. The only result of the enactment of that provision is that "Congress has superseded whatever domestic effect the Geneva Conventions may have had in actions such as this." *Ibid.*

Petitioner asserts (Pet. 12) that the decision of the court of appeals "encroaches upon the powers of the Executive and Legislative branches." But because "a later-in-time federal statute supersedes inconsistent treaty provisions," *Medellin*, 128 S. Ct. at 1359 n.5, the decision below correctly gives effect to the statute that Congress enacted. He also suggests (Pet. 11) that Section 5 violates the Supremacy Clause, U.S. Const. Art. VI, to the extent that it conflicts with the Third Geneva Convention, but that argument is foreclosed by the well-established principle, noted above, that a later-enacted statute may supersede a treaty.*

2. As the court of appeals recognized, petitioner's claims fail for the independent reason that the Third Geneva Convention does not prohibit the extradition of a prisoner of war to face criminal charges in another country. Pet. App. 14a-18a. Petitioner's challenges to that conclusion (Pet. 13-23) lack merit.

---

* As petitioner acknowledges (Pet. 10), *Boumediene* v. *Bush*, 128 S. Ct. 2229 (2008), invalidated a different provision of the MCA but did not address Section 5. In *Boumediene*, the Court concluded that Section 7 of the MCA, 120 Stat. 2635, violated the Suspension Clause, U.S. Const. Art. I, § 9, because it "deprive[d] the federal courts of jurisdiction to entertain the habeas corpus actions" brought by alien enemy combatants, and the Court held that provision unconstitutional to that extent. *Boumediene*, 128 S. Ct. at 2244, 2274; see Pet. App. 6a. Unlike Section 7, which was a jurisdiction-stripping provision, Section 5 does nothing to prevent a person from seeking habeas relief. It merely removes "one substantive provision of law upon which a party might rely in seeking habeas relief." *Ibid.*

Petitioner focuses (Pet. 13) on Article 118 of the Third Geneva Convention, which provides that "[p]risoners of war shall be released and repatriated without delay after the cessation of active hostilities." 6 U.S.T. at 3406. But Article 118 is limited by Article 119, which states that "[p]risoners of war against whom criminal proceedings for an indictable offence are pending may be detained until the end of such proceedings, and, if necessary, until the completion of the punishment. The same shall apply to prisoners of war already convicted for an indictable offence." 6 U.S.T. at 3408. As the court of appeals noted, Article 119 has allowed the United States to retain custody over petitioner after hostilities in Panama ceased, to try him for the crimes with which he was charged, and to hold him for the duration of his criminal sentence. Pet. App. 15a. That provision also permits a party to the convention to honor an extradition treaty by transferring a prisoner of war to another party to the convention to face criminal charges there. See *ibid.* ("Nowhere * * * [in Article 119] is it suggested that a prisoner of war may not be extradited from one party to the Convention to face criminal charges in another.").

The only provision of the Third Geneva Convention to restrict extradition is Article 12, which provides for the transfer of prisoners of war between parties to the convention "after the Detaining Power has satisfied itself of the willingness and ability of such transferee Power to apply the Convention." 6 U.S.T. at 3328. In this case, as both the district court and court of appeals confirmed, the conditions specified in Article 12 have been satisfied by means of diplomatic communications between France and the United States. Pet. App. 16a, 31a-32a. But nothing in Article 12 "implies that a con-

tracting party cannot abide by a valid extradition treaty and extradite a prisoner of war to another contracting party simply because the person is a prisoner of war." *Id.* at 16a.

Petitioner maintains (Pet. 21) that the absence of the term "extradition" in the Third Geneva Convention, along with a specific reference in Article 129 to the transfer from one party to another of war criminals, means that prisoners of war may not be extradited, and that they may only be transferred to another nation if they are war criminals. But that reading of the convention does not comport with Article 12, which places only the two restrictions noted above on the transfer of a prisoner of war: that the transfer be to another contracting party, and that the transferee country give assurances that the convention will be followed. Article 129 discusses only the ongoing duty of each contracting party to search for war criminals and bring them to justice, and it places no further restrictions on the transfer of prisoners of war. 6 U.S.T. at 3418.

More fundamentally, petitioner's argument (Pet. 14) based on a lack of "specific authority permitting extradition of prisoners of war" misses the mark. The authority to extradite comes not from the Third Geneva Convention itself but from pre-existing extradition treaties, such as the one between the United States and France that is at issue here. The lack of any indication in the Third Geneva Convention that it is intended to invalidate or supersede such treaties shows that a contracting party to the Convention retains its authority to abide by its other international obligations, including its obligations under valid extradition treaties. Pet. App. 17a n.10.

Petitioner also asserts (Pet. 15-18) that the courts below should not have relied on language in Article 45 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287, which provides for the transfer of civilians between parties to the Convention and specifically provides that it does not bar extradition. The court of appeals, like the district court, recognized that the Third and Fourth Geneva Conventions are distinct, but nevertheless found it persuasive that the parties to the conventions contemplated that "transfer" included extradition. Pet. App. 17a, 41a-42a. "To conclude otherwise," the court of appeals reasoned, "would mean that a country would be obligated to extradite a civilian, but not a prisoner of war, when they are facing identical criminal charges." *Id.* at 17a. It was appropriate for the courts below to support their interpretation of the Third Geneva Convention by reading the Geneva Conventions as a whole and harmonizing provisions with similar underlying principles. See *Minnesota* v. *Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202 (1999); *El Al Israel Airlines, Ltd.* v. *Tsui Yuan Tseng*, 525 U.S. 155, 167-169 (1999).

In sum, the court of appeals' conclusion that petitioner's extradition to France is not barred by the Third Geneva Convention is a reasonable construction of the convention that comports with its text and overall purposes. The court of appeals' reading is also consistent with the views of the Executive Branch, which are entitled to respect. See *Medellin*, 128 S. Ct. at 1361; *Sumitomo Shoji America, Inc.* v. *Avagliano*, 457 U.S. 176, 184-185 (1982) ("Although not conclusive, the meaning attributed to treaty provisions by the Government agen-

cies charged with their negotiation and enforcement is entitled to great weight.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELENA KAGAN
Solicitor General
LANNY A. BREUER
Assistant Attorney General
KATHLEEN A. FELTON
Attorney

SEPTEMBER 2009

Supreme Court, U.S.
FILED
SEP 2 2 2009
OFFICE OF THE CLERK

No. 09-35

IN THE

Supreme Court of the United States

GENERAL MANUEL ANTONIO NORIEGA,

Petitioner,

v.

GEORGE PASTRANA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF

FRANK. A. RUBINO
1001 Brickell Bay Drive
Suite 2206
Miami, FL 33131
(305) 858-5300

JON MAY*
1001 Brickell Bay Drive
Suite 2206
Miami, FL 33131
(305) 373-3740

Counsel for Petitioner

* *Counsel of Record*

225351

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

I. Whether the Eleventh Circuit Court of Appeals's interpretation of Section 5 of the Military Commissions Act of 2006 violates the Supremacy Clause of the Constitution of the United States.

II. Whether the Eleventh Circuit Court of Appeals's interpretation of the Geneva Convention to permit the extradition of prisoners of war conflicts with previous decisions of this Court on treaty interpretation and statutory construction.

ARGUMENT

1. The decision below affects the rights of hundreds of prisoners in United States' custody. While these prisoners are currently designated "enemy combatants" no court has yet decided their status under the Geneva Convention. General Noriega was declared a prisoner of war by the United States District Court for the Southern District of Florida after the Honorable William Hoeveler held that the District Court was a competent tribunal as that term is employed by the Geneva Convention. *United States v. Noriega*, 808 F.Supp. 791, 793-96 (S.D.Fla. 1992)(citing Article 5, Geneva Convention Relative to the Treatment of Prisoners of War (Geneva III), August 12, 1949, 6 U.S.T. 3316). Unless the decision below is overturned, these prisoners will no longer have the right to have their status determined by a competent tribunal.

2. The government's interpretation of Section 5 of the Military Commission Act of 2006 (MCA), 28 U.S.C. § 2241(e) renders the statute unconstitutional. *Boumediene v. Bush*, 128 S.Ct. 2229 (2008). In *Boumediene*, this Court recognized that restrictions to habeas corpus can themselves result in a suspension of the writ. By denying the courts the authority to consider violations of the Geneva Convention, Congress has done just that.

The question presented in *Boumediene* was whether the Detainee Treatment Act of 2005 (DTA), 119 Stat. 2739, provided an adequate substitute for habeas corpus. *Id.* at 2262. Of critical significance to that question was whether detainees were otherwise

afforded an opportunity to litigate their claims in court. At a minimum, an adequate substitute must provide the prisoner "a meaningful opportunity to demonstrate that he is being held pursuant to 'the erroneous application or interpretation' of relevant law." *Boumediene* at 2266, citing *INS v. St. Cyr*, 533 U.S. 289, 302, 121 S.Ct. 2271 (2001). That relevant law remains the Geneva Convention. Indeed, the Eleventh Circuit recognized that the Military Commission Act did not "change the international obligations of the United States under the Geneva Conventions." Response in Opposition, p. 8, citing, Pet. App. 11a.

The legislative history confirms that the Military Commission Act was intended to restrict habeas corpus. *Boumediene* at 2265. It did this by replacing a panoply of procedure protections with a far more limited regime, *Id.* at 2269; a regime that this Court ultimately held constituted a violation of the suspension clause. *Id.* at 2275. But the limitation on habeas corpus was not just procedural. In Article 5 of the MCA, Congress also restricted the substantive law that a petitioner could invoke. If, as the government argues, Section 5 removes the Geneva Convention as relevant law, that effectively works a suspension of the writ as well. In arguing that "Section 5 does nothing to prevent a person from seeking habeas relief," Brief in Opposition p. 8, note, the government asks this Court to ignore the implications of its argument: which is, to divorce the writ from the law is to destroy the writ.

3. The Geneva Convention permits the Detaining Power to delay repatriation of a prisoner of war pending the completion of a criminal sentence imposed by the

Detaining Power. Article 119, para. 5 (GC III). Upon completion of that sentence repatriation is mandatory. Nothing in the Convention authorizes further delay pending completion of a sentence by another nation unrelated to the conflict. Moreover, the Republic of France does not recognize General Noriega's status as a prisoner of war. Pet. App. 26a. If a Detaining Power is permitted to extradite a prisoner of war to another nation, there is no guarantee that the Receiving Power will ever repatriate the prisoner to his home nation.

The government claims there is no indication that the Third Geneva Convention was intended to invalidate or supersede existing extradition treaties. Brief in Opposition, p. 10. This is incorrect. Regardless of the existence of any other treaty, the Geneva Convention affirmatively imposes on a Detaining Power the obligation to prosecute, or extradite for prosecution, war criminals. Article 129 (GCIII). The government's argument is further undermined by the absence of general extradition authority in the Prisoner of War Convention despite the presence of such authority in the Civilian Convention, Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 6 U.S.T. 3516, Article 45; a circumstance that reflects the intention of the drafters to deny the authority in the former (except for war criminals) that it granted in the latter. *Hamden v. Rumsfeld*, 548 U.S. 557, 578, 126 S.Ct. 2749, 2765-66 (2006). Finally, the government's contention that Article 12 (GCIII) provides the sole limitation on the extradition of prisoners of war, is belied by the Commentary to that Article which demonstrates that this Article was only demonstrates intended to regulate transfers of POWs

between allied powers during times of war. 3 Int'l Committee of the Red Cross, Commentary, Genera Convention Relative to the Treatment of Prisoners of War 131-35 (1960). It was never intended to have anything to do with extradition.

Under a plain reading of Article 118, the United States is required to repatriate General Noriega to Panama. This interpretation is supported by applicable rules of statutory construction and by the Commentary to Article 12. The government has failed to demonstrate that any other result would satisfy the mandate of the Convention.

CONCLUSION

The petition for certiorari should be granted and General Noriega repatriated to Panama.

Respectfully submitted,

FRANK. A. RUBINO
1001 Brickell Bay Drive
Suite 2206
Miami, FL 33131
(305) 858-5300

JON MAY*
1001 Brickell Bay Drive
Suite 2206
Miami, FL 33131
(305) 373-3740

Counsel for Petitioner

* *Counsel of Record*

(4)

No 09-35

IN THE

Supreme Court of the United States

GENERAL MANUEL ANTONIO NORIEGA,

Petitioner,

v

GEORGE PASTRANA,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR REHEARING

FRANK A RUBINO
1001 Brickell Bay Drive
Suite 2206
Miami, FL 33131
(305) 858-5300

JON MAY
Counsel of Record
1001 Brickell Bay Drive
Suite 2206
Miami, FL 33131
(305) 373-3740

Counsel for Petitioner

228104

COUNSEL PRESS
(800) 274 3321 • (800) 359 6859

QUESTION PRESENTED

Whether as a consequence of the government's release of the petitioners in *Kiyemba v Obama*, No 08-1234, review in this case is warranted to determine whether the limitations placed on habeas review by Section 5 of the Military Commissions Act (2006) constitute a suspension of the writ, whether the Geneva Convention relative to the treatment of prisoners of war (GC III) is self-executing, whether detainees held as enemy combatants are entitled to protection under Article 5 or common Article 3 (GC III), and whether such persons are entitled to immediate repatriation upon the cessassion of hostilities, providing guidance needed by the lower courts considering habeas petitions by detainees

TABLE OF CONTENTS

	Page
Question Presented	I
Table of Contents	II
Table of Cited Authorities	III
Argument	1
Conclusion	8

TABLE OF CITED AUTHORITIES

Page

Cases:

Al-Marri v Pucciarelli,
534 F 3d 213 (4th Cir 2008)(en banc),
vacated and dismissed as moot in
Al-Marri v Spagone,
129 S Ct 1545 (U S 2009) 7

Boumediene v Bush,
553 U S ___. 128 S Ct 2229 (2008) *passim*

Ghaleb Al-Bihani v Obama,
590 F 3d 866 (D C Cir 2010) 2, 3

Hamden v Rumsfeld,
344 F Supp 2d 152, 161 (D D C 2004),
rev'd, 415 F 3d 33 (D C Cir 2005),
rev'd 548 U S 557 (2006) 7

Hamdi v Rumsfeld,
542 U S 507, 124 S Ct 2633 (2004) 2

INS v St Cyr,
533 U S 289 (U S 2001) 3

Khalid v Bush,
355 F Supp 2d 311, 326 (D D C 2005),
vacated and dismissed sub nom
Boumediene v Bush,
476 F 3d 981 (D C Cir 2007),
rev'd Boumediene v Bush,
553 U S __, 128 S Ct 2229 (2008) 7

Cited Authorities

	Page
Kiyemba v Obama, No 08-1234	i, 1
Marbury v Madison, 1 Cranch 137 (1803)	1
Noriega v Pastrana, No 09-35	5
United States v Noriega, 808 F Supp 791 (S D Fla 1992)	5
Constitution, Treaties, and Statutes:	
U S Const	
Art I, §9 (Suspension Clause)	5
Detainee Treatment Act (DTA) of 2005, 119 Stat 2739	2
Geneva Convention Relative to the Treatment of Prisoners of War, Aug 12, 1949, 6 U S T 3316, 75 U N T S 135	*passim*
Art 3	i, 1, 6
Art 5	i, 1, 5
Art 118	6
Art 119	6

Cited Authorities

	Page
Military Commissions Act (MCA) of 2006, Pub L No 109-366, 120 Stat 2600	2
Military Commissions Act (MCA) of 2009, Pub L No 111-84	2, 3, 5
10 U S C §948a (6)	2
10 U S C §948a (7)	2
10 U S C §948b(a)	5
10 U S C §948s	4
10 U S C §949a(b)(2)(a)	4
10 U S C §949a(b)(3)(D)	4
10 U S C §949j	4
28 U S C §2241	1, 5
Miscellaneous:	
Glenn Sulmasy, The National Security Court System, (Oxford, 2009)	6
White House Memorandum, "Humane Treatment of al Qaeda and Taliban Detainees" (February 7, 2002), *available at http //www washington post com/wp-srv/nation/documents/ 020702bush pdf*	2

ARGUMENT

As A Consequence Of The Government's Release Of The Petitioners In *Kiyemba v. Obama*, No. 08-1234, Review In This Case Is Warranted To Determine Whether The Limitations Placed On Habeas Review By Section 5 Of The Military Commissions Act (2006) Constitute A Suspension Of The Writ, Whether The Geneva Convention Relative To The Treatment Of Prisoners Of War (GC III) Is Self-Executing, Whether Detainees Held As Enemy Combatants Are Entitled To Protection Under Article 5 Or Common Article 3 (GC III), And Whether Such Persons Are Entitled To Immediate Repatriation Upon The Cessassion Of Hostilities, Providing Guidance Needed By The Lower Courts Considering Habeas Petitions By Detainees

With the release of the petitioners in *Kiyemba v Obama*, No 08-1234, it unlikely that this Court will determine the scope of review permitted by 28 U S C §2241 anytime in the near future Consequently, district courts considering as many as 200 habeas petitions will be forced to determine factual questions under a fog of uncertain constitutional jurisprudence Unless this Court acts now to say "what the law is" *Boumediene v Bush*, 553 U S __, 128 S Ct 2229, 2259 (2008)(quoting *Marbury v Madison*, 1 Cranch 137, 177 (1803)) the innocent and the guilty alike will continue to be denied meaningful review of both the conditions of their confinement and the length of their detention

Following the events of 9-11, the government sought to hold enemy combatants without any process, a procedure found constitutionally infirm in *Hamdi v Rumsfeld*, 542 U S 507, 124 S Ct 2633 (2004) In response to this Court's determination that the Constitution required a detainee's status be determined by a "neutral decision-maker," *id* at 533, the Executive created Combatant Status Review Tribunals and Congress enacted the Detainee Treatment Act (DTA) of 2005, 119 Stat 2739 and the Military Commissions Act (MCA) of 2006, Pub L No 109-366, 120 Stat 2600, both subsequently struck down by this Court In holding these provisions to be unconstitutional, this Court left it to the lower courts to develop "the contours of the substantive and procedural law of detention" *Ghaleb Al-Bihani v Obama*, 590 F3d 866, 870 (D C Cir 2010), citing *Hamdi v Rumsfeld*, 542 U S 507, 522 n 1 (2004), *Boumediene*, 128 S Ct at 2276

For as long as eight years, the United States Military has detained prisoners without any determination by a neutral decision-maker that these persons have engaged in conduct warranting their detention under United States law Indeed, two administrations have struggled with the very language used to denominate the detained, first calling some "enemy combatants" or "unlawful enemy combatants," and later "privileged enemy belligerents" or "unprivileged enemy belligerents"[1] Both the Congress and

---

1 White House Memorandum, "Humane Treatment of al Qaeda and Taliban Detainees" (February 7, 2002), *available at http //www washingtonpost com/wp-srv/nation/documents/020702bush pdf*, denying both Taliban and Al Qaeda, Prisoner of War status, and denominating both "unlawful enemy combatants," Military Commissions Act of 2009, Pub L No 111-84, 10 U S C §948a (6) and (7)

the Executive have failed to provide a means to adjudicate the status of detainees that passes constitutional muster, and that failure has been exacerbated by this Court's practice of deferring ruling on constitutional questions until the issues have been exhaustively addressed by the lower courts, a practice that may serve the national interests in most instances, but has not here As Judge Brown recently observed in his concurrence in *Al-Bihani*

> The common law process depends on incrementalism and eventual correction, and it is most effective where there are a significant number of cases brought before a large set of courts, which in turn enjoy the luxury of time to work the doctrine supple None of those factors exist in the Guantanamo context

Id at 881

It is true that this Court has not left the political branches entirely at sea In *Boumediene* this Court described the topology of the guarantees granted habeas petitioners by the Constitution Thus, a detainee must be granted a "meaningful opportunity to demonstrate that he is being held pursuant to 'the erroneous application or interpretation' of relevant law *St Cyr*, 533 U S , at 302, 121 S Ct 2271 " *Id* at 2266 To that end, the detainee must be afforded a "a full and fair opportunity to develop the factual predicate of his claims " *Id* at 2273 [2] Moreover, "the habeas court must

---

2 The Military Commission Act of 2009, Pub L 111-84, codified at 10 U S C §948 et seq , purports to provide the (Cont'd)

have the power to order the conditional release of an individual unlawfully detained-though release need not be the exclusive remedy and is not the appropriate one in every case in which the writ is granted." *Id.* at 2266. But what standards govern those determinations?

In this Petition, this Court is directly confronted with determining "the content of the law that governs" the detention of prisoners of war, a question left unanswered by *Boumediene*, 128 S. Ct. at 2274 ("In view of our holding we need not discuss the reach of the writ with respect to claims of unlawful conditions of treatment or confinement.") More specifically, review would determine whether Congress has the authority to "eliminate the Geneva Convention as a source

---

(Cont'd)

procedural protections constitutionally required in the trial of unprivileged enemy belligerents. The MCA requires that charges be served upon the accused in a "language that the accused understands" and "sufficiently in advance of trial to prepare a defense." §948s. It guarantees the right of the accused to present evidence in his defense, cross-examine the witnesses against him, and examine and respond to all evidence admitted against him. §949a(b)(2)(A). It further provides for compulsory process to obtain evidence from any location where the United States has jurisdiction. §949j. But these guarantees may be more illusory than real. First, the rules permit the introduction against the defendant of hearsay testimony which the accused may have no way to confront. §949a(b)(3)(D). Second, much of the evidence that may be needed by the defense will not be available since it will be located in territory outside the jurisdiction of the United States. The result may be a conviction based entirely upon hearsay that the accused was both unable to confront for lack of cross-examination and unable to rebut for lack of access to witnesses or evidence.

of rights upon which §2241 petitioners may rely" *Noriega v Pastrana*, No 09-35, dissent by Justice Thomas, slip, op , at 8 This is a question of vital importance to those district courts considering petitions by detainees challenging the conditions of confinement as well as those courts considering petitions by detainees seeking their release and repatriation As Justice Thomas pointed out, review of this Petition would necessarily answer three questions that have confronted the lower courts first, whether the Geneva Conventions are self-executing, second, whether federal courts may classify detainees as POWs under the Third Convention, and finally, whether the United States is required to immediately repatriate detainees after hostilities have ceased *Id* at 14

If the Geneva Convention is self-executing, and if §5 MCA violates the Suspension Clause, Art I, §9, then the district court is "a competent tribunal" entitled to determine the status of the prisoner, under Article 5, GCIII *See e g United States v Noriega*, 808 F Supp 791, 803 (S D Fla 1992) (holding that the court was a competent tribunal as required by the Geneva Convention and declaring that General Noriega was a prisoner of war) The court will then be able to determine if the detainee is subject to trial by Military Commission pursuant to 10 U S C §948b(a)(establishing the procedures for the use of military commissions to try unprivileged enemy belligerents for violations of the laws of war) If the court determines that the detainee is a privileged enemy belligerent—a prisoner of war under Art 5, GCIII—the detainee would not be subject to trial under the MCA (2009), instead he would be entitled to immediate repatriation upon the cessation

of hostilities, Art 118, GCIII, or the completion of a sentence under some other provision, Art 119, GCIII In either event the court would have the authority to order the release of the detainee pursuant to the Geneva Convention If the Court determines that the detainee is an unprivileged enemy belligerent, the court will still have the power to insure that the detainee is treated in accordance with the protections guaranteed by Common Art 3, GCIII

Our government's policies toward persons detained in the war on terror have been a failure

> [T]he administration's decision to proceed with military commissions as the best way to adjudicate their crimes against the United States has wreaked havoc with the United States' fight against international terror and has eroded American leadership in other areas throughout the world The ambiguity surrounding the status of detainees, as compared to established global norms for dealing with traditional prisoners of war (POWs), has also lead to widespread cynicism, both domestically and internationally, about the true mission of the facility Questions have been constantly raised about whom we are detaining, whom we might detain in the future, and what kind of oblique justice will be applied to them

Glenn Sulmasy, The National Security Court System, p 4 (Oxford, 2009) As this Court observed in *Boumediene*, "Some of these petitioners have been in custody for six years with no definitive judicial determination as to the legality of their detention Their access to the writ is a

necessity to determine the lawfulness of their status, even if, in the end, they do not obtain the relief they seek." 128 S Ct at 2275. In response this Court expedited the review of habeas petitions dispensing with the requirement for exhaustion. *Id.* Despite this Court efforts, the proceedings before the district courts remain bogged down as the courts grapple with legal issue that remain.[3] As Justice Thomas has argued, regardless of how this Court were to rule upon General Noriega's petition, it is in the national interests for this Court to provide "the political branches a clearer sense of the constitutional limits to which new legislative or policy initiatives must adhere." (Justice Thomas dissent, slip, op., p. 14). It is of even more pressing importance for the lower courts to know precisely what law applies to detainees so that they can promptly adjudicate the claims before them. Ultimately resolution of the questions presented herein is in the interests of all parties, the courts, the detainees, and the United States.

---

3. In *Al-Marri v. Pucciarelli*, 534 F.3d 213 (4th Cir. 2008) (en banc), *vacated and dismissed as moot in Al-Marri v. Spagone*, 129 S. Ct. 1545 (U.S. 2009), the Fourth Circuit held that as a result of the this Court's decision in *Boumediene* the district court had jurisdiction to consider a *habeas* petition on behalf of Ali Saleh Kahlah al-Marri, an alien arrested in the United States and detained as an enemy combatant but found little agreement as to the scope of activity making a person an "enemy combatant." In *Khalid v. Bush*, the district court held that the Geneva Convention was not self-executing. 355 F. Supp. 2d 311, 326 (D.D.C. 2005), *vacated and dismissed sub nom. Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007), *rev'd Boumediene v. Bush*, 553 U.S. __, 128 S.Ct. 2229 (2008). In *Hamden v. Rumsfeld*, the district court disagreed holding that the Geneva Convention applied to the entire Afghan theater of conflict. 344 F. Supp. 2d 152, 161 (D.D.C. 2004), but this holding was reversed by the D.C. Circuit Court of Appeals, 415 F.3d 33 (D.C. Cir. 2005), *rev'd* 548 U.S. 557 (2006).

CONCLUSION

The petition for certiorari should be granted and General Noriega repatriated to Panama pursuant to the Geneva Convention

Respectfully submitted,

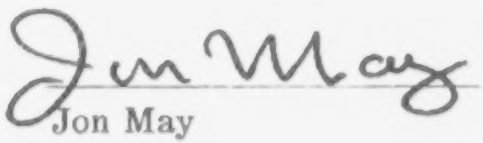
FRANK A. RUBINO
1001 Brickell Bay Drive
Suite 2206
Miami, FL 33131
(305) 858-5300

JON MAY
Counsel of Record
1001 Brickell Bay Drive
Suite 2206
Miami, FL 33131
(305) 373-3740

Counsel for Petitioner

CERTIFICATE OF GOOD FAITH

The undersigned hereby certifies that this petition for rehearing is restricted to the grounds specified in Rule 44 2 of the Rules of the Supreme Court and is presented in good faith and not for delay



Jon May